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CIS

HABEAS CORPUS PROCEDURES AMENDMENTS ACT OF 1981

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

S. 653

A BILL TO AMEND TITLE 28 OF THE UNITED STATES CODE TO MODIFY HABEAS CORPUS PROCEDURES

NOVEMBER 13, 1981

Serial No. J-97-80

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HABEAS CORPUS PROCEDURES AMENDMENTS ACT OF 1981

FRIDAY, NOVEMBER 13, 1981

U.S. SENATE,
SUBCOMMITTEE ON COURTS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:35 a.m., in room 2228, Dirksen Senate Office Building, Senator Howell Heflin (acting chairman of the subcommittee) presiding.

Staff present: Richard W. Velde, chief counsel; Kevin Manson, counsel; Linda E. White, chief clerk; Will Lucius, counsel, Committee on the Judiciary; Boyd Hollingsworth, counsel, Immigration Subcommittee; Arthur Briskman, minority counsel; and Paula Argento, minority counsel.

OPENING STATEMENT OF SENATOR HOWELL HEFLIN

Senator **HEFLIN**. We will get started. The chairman of the subcommittee, Senator Robert Dole, is tied up on the floor. I believe Senator Dole has been the busiest member of the U.S. Senate in the last 7 or 8 months, having been chairman of the Finance Committee and very active in the farm legislation, and now having to be on the floor. I am delighted to start the hearing and if he comes over, then of course he will preside.

Today the Subcommittee on Courts will examine an important matter of Federal concern bearing on our criminal justice system. We will be engaged in determining the merits of S. 653, legislation to amend the Federal habeas corpus procedures with regard to State prisoners convicted under State judgments. This subject raises the serious issue of the Federal and institutional roles of our State and Federal courts and the equal application of constitutional rights.

We would like to commend Chairman Thurmond and Senator Chiles and their most capable staffs for their diligent work on this proposal. I would like to thank Senator Dole, the subcommittee chairman, and his staff for their efforts and cooperation in preparing today's hearing.

The ability of a lower Federal court to overturn a State court judgment in collateral habeas corpus proceedings raises a serious question regarding the finality and the integrity of State court decisions. This finality and integrity does serve an important function in the Federal system Under our Constitution, the Federal and

State judiciary share the same responsibility to make decisions regarding the Constitution and the Federal law.

When a defendant is tried in State court for a violation of State law, it is the duty of a State judge to conscientiously decide any Federal question which may arise in accordance with the Constitution. One important check on whether the State court is properly administering Federal law is review by the U.S. Supreme Court. This is available on appeal from decisions by the highest State tribunal. Given this system of review, some have questioned whether our Federal system requires an additional collateral review of State court decisions by lower Federal courts and what purpose this review will serve.

There is no doubt that the problems of finality and integrity in State court judgments also have an acute effect on the enforcement of our criminal law. This is not a recent phenomenon. In fact, the Bible describes well the tendencies of human nature—Ecclesiastes 8:11: "Because sentence against an evil work is not executed speedily, the heart of the sons of men is fully set to do evil." Our criminal justice system cannot be effective unless one who violates the law knows that he will be punished swiftly and certainly. Criminals who do not fear immediate punishment are much more likely to break the law again.

At the same time it must be remembered that American criminal justice involves respect for one's constitutional rights. Certainly there is a fundamental concern that our criminal justice system incorporate the notion of due process and equal protection. Ultimately it must strike a balance between the need for presenting claims in an orderly and timely manner and the need to prevent conviction of the innocent and disregard for our constitutional safeguards.

During these hearings, this subcommittee hopes to explore the problems surrounding our existing Federal habeas corpus proceedings. We will hear from seven witnesses who will discuss whether the proposed legislation would be an appropriate, workable solution towards restoring public confidence in the criminal justice system.

The statement of Chairman Thurmond will be entered into the record at this point. If the chairman of the subcommittee, Robert Dole, wants to enter anything in the record it may be entered later. The record will be open.

[The prepared statement of Senator Thurmond and a copy of S. 653 follow:]

PREPARED STATEMENT OF SENATOR STROM THURMOND

Mr. Chairman, I want to commend the distinguished Senator from Alabama (Mr. Heflin) for taking time from his busy schedule to chair this hearing on this most important issue.

It is absolutely essential that we reexamine methods to enhance the credibility of our criminal justice system and place some reasonable limitations on repeated litigation surrounding criminal convictions. In this regard, this bill deals with one aspect of the system—that of Federal review of State criminal convictions.

As I noted when I introduced this bill in March of this year, S. 653 contains four proposals to address the repeated attacks on State criminal convictions on frivolous grounds in Federal habeas corpus petitions. The purpose of these proposals is to meet long-standing concerns of the States over undue Federal interference in State criminal convictions and to ensure a greater degree of certainty in the finality of convictions.

The first proposal requires that a district judge, rather than a magistrate, hear the cases in which evidentiary hearings are necessary. This recognizes the importance in our Federal system of State criminal justice proceedings by requiring the experience and authority of a Federal judge to determine the validity of decisions of State supreme courts.

Second, this bill would bar Federal habeas corpus review of a defendant's failure to object to the admission of inculpatory statements as requried by State law without a showing of non-compliance and some showing of actual prejudice. This would codify the 1977 decision of the Supreme Court in *Wainright* v. *Sykes.*

The third proposal establishes reasonable time limits within which a Federal habeas corpus action must be commenced.

Finally, the bill provides that where the record in the State court provides a factual basis for the actual findings and such record was made under such circumstances that afforded the petitioner a full and fair hearing, then limits are set on the necessity for evidentiary hearings by the Federal Court.

It is not my intention that this bill should in any way affect legitimate petitions that are clearly meritorious and require close scrutiny. It is my intention, however, that repeated assaults upon legitimate State convictions through obviously spurious petitions be curtailed. To continue to countenance such activity by lack of legislative action not only flies in the face of our Federal system but does injustice to the Great Writ itself.

II

97TH CONGRESS
1ST SESSION

S. 653

To amend title 28 of the United States Code to modify habeas corpus procedures.

IN THE SENATE OF THE UNITED STATES

MARCH 10 (legislative day, FEBRUARY 16), 1981

Mr. THURMOND (for himself and Mr. CHILES) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend title 28 of the United States Code to modify habeas corpus procedures.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Habeas Corpus Procedures Amendments Act of 1981".

SECTION 1. Section 636(b)(1)(B) of title 28, United States Code, is amended to read as follows:

"(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, except evidentiary hearings in cases brought pursuant to section 2254 of this title, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for post-trial relief made by individuals convicted of criminal offenses in a United States district court.".

SEC. 2. Section 2244 of title 28, United States Code, is amended by adding at the end thereof the following new subsections:

"(d) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, if the Federal question presented was not properly presented under State law in the State court proceedings both at trial and on direct appeal, or properly presented in a collateral proceeding and disposed of exclusively on the merits, the claim may not be considered or determined by a judge or court of the United States, unless the petitioner establishes that the alleged violation of the Federal right was prejudicial to the petitioner as to his guilt or punishment and that—

"(1) the Federal right asserted did not exist at the time of the trial and that right has been determined to be retroactive in its application;

"(2) the State court procedures precluded the petitioner from asserting the right sought to be litigated;

"(3) the prosecutorial authorities or a judicial officer suppressed evidence from the petitioner or his attorney which prevented the claim from being raised and disposed of; or

"(4) material and controlling facts upon which the claim is predicated were not known to petitioner or his attorney and could not have been ascertained by the exercise of reasonable diligence.

"(e) No petition filed in behalf of a person in custody pursuant to the judgment of a State court shall be considered or determined by a judge or court of the United States if it is not filed within three years from the date the State court judgment and sentence became final under State law, unless the Federal right asserted did not exist at the time of the State court trial and that right has been determined to be retroactive, in which case the petition may be entertained within three years from the date said right was determined to exist.".

SEC. 3. Section 2254(d) of title 28, United States Code, is amended to read as follows:

"(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall not be redetermined or relitigated by a judge or court of the United States, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

"(1) that the merits of the factual dispute were not resolved in the State court hearing;

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts could not be developed at the State court hearing;

"(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding; or

"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that there is no evidence to support such finding.

No evidentiary hearing may be conducted in the Federal court when the State court records demonstrate the factual issue was litigated and determined, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (6), inclusive, is shown by the applicant.".

Senator HEFLIN. We are honored to have with us the Honorable Lawton Chiles, the U.S. Senator from the State of Florida. If you will, we would be delighted at this time, Senator Chiles, for you to come forward. You might want to bring some of your Floridians with you, if you would like to.

STATEMENT OF HON. LAWTON CHILES, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator CHILES. Thank you very much, Mr. Chairman. I would like to have Attorney General Jim Smith come up with me.

I might say at the outset that Attorney General Smith is the one who brought this problem to my attention and I think that he has tried to bring it to the attention of many, many other people. He said that it was absolutely necessary that we try to do something about habeas corpus as it is now being used and the time which its frivolous use is taking of the whole court system. I certainly want to compliment him for that concern, and for his effort, both from the legal and the scholarly end, in trying to put together a proposal. I also want to thank him for his time and effort in trying to bring this problem to the attention of us in the Congress to many other people in order to build a constituency for trying to address this law.

I am delighted to be here today to testify on behalf of S. 653, a bill to reform the Federal habeas corpus statute, and I am especially pleased that you are chairing these hearings. Your past service as the chief justice of the Alabama Supreme Court certainly provides you with an invaluable firsthand insight into the problems in this area.

I think we all recognize that making changes in the habeas corpus statutes is not an easy thing to do. It is certainly something that must be considered very carefully. But over the last few years a number of respected judges and legal scholars have called for a reexamination of our present system. Both Justice Black and Judge Henry Friendly raised various questions about the easy availability of habeas corpus for State prisoners.

Attorney General Jim Smith has compiled a study of the use of habeas corpus remedy over a period of several years, and that study pointed to numerous instances of abuse in today's system. It was the jumping-off place for his efforts to reform the current law.

Earlier this year, Chief Justice Burger, in his speech to the American Bar Association, stressed the need to recognize, at some point, finality of judgment in our criminal justice system. The bill that Senator Thurmond and I introduced was designated to address some of the problems in the current system. The purpose of the bill is to give greater respect to orderly State court procedures, to assure that habeas corpus cases are considered in a timely manner, and to instill the notion of finality of judgment in our State criminal justice systems.

First I would like to review the state of affairs today, and then turn to a discussion of S. 653.

The past 25 years have brought about an explosion of the use of habeas corpus writ by State prisoners to attack their State court convictions. The writ itself was first made available to State prisoners in a statute enacted by Congress in 1867. In 1953, in the *Brown* v. *Allen* case, the Supreme Court interpreted the 1867 statute in such a way as to give Federal district courts broad authority to redetermine the merits of State court convictions.

At that time Justice Jackson expressed deep concern over the—and I quote: "Floods of stale, frivolous, and repetitious petitions which will swamp the dockets of the lower courts and swell our own." Mr. Justice Jackson's observations have proven all too accurate, as prisoners have taken advantage of the easy availability of the access to Federal courts.

In 1953 that flood consisted of 551 petitions; last year there were 7,031 such petitions filed by State prisoners in Federal courts, representing a thirteenfold increase in the number of petitions filed since 1953. In fact, the total number of State prisoner petitions, which includes other forms of challenge to the conviction, now accounts for over 11 percent of the total number of all civil cases filed in the Federal courts today.

I believe that the current state of affairs is harmful to the effective functioning of our courts and to our criminal justice system. First of all, the easy availability of such review is at odds with one of the most fundamental principles of our judicial system, the notion of finality. The habeas cases relitigate the same facts and issues that were decided in the State courts, either at trial or on direct appeal.

We all recognize that finality in criminal cases will not carry the same weight that it does in civil cases but it does not follow that finality has no place at all in our criminal justice system. Yet the current system operates in such a way as to suggest that a prisoner, duly convicted in full and fair State proceedings, can challenge that conviction time and time again for years or even decades after his State court conviction became final.

Factual issues can end up being redetermined long after the crime was committed and the initial trial was held. In the meantime the evidence may have disappeared or key witnesses may no longer remember crucial details. The State is prejudiced by these long delays, and more importantly, the delays hurt the reliability of the factfinding process. Needless to say, as you well know, extensive Federal court review of State court convictions can create unnecessary friction between the State court systems and the Federal courts.

This lack of finality hampers the courts and the criminal justice system in other ways as well. An effective criminal justice system must let would-be criminals know that they will be punished for committing crimes. This deterrence is not effective if prisoners have easy access to the Federal courts to file attacks on their convictions.

As a result, the word gets out to would-be criminals that even if you are caught and sent to prison, you may not have to serve out that sentence. The message gets to the public as well, and the result is an erosion of public confidence in the ability of the criminal justice system or the courts to deal with crime.

Furthermore, the sheer volume of petitions filed is a strain on the resources of our courts. When our prosecutors and our defense attorneys and judges devote their time and their efforts to reviewing and processing these petitions, we end up diluting the resources of the courts. We add to the delay in bringing original criminal and civil cases to trial.

Ironically, the flood of petitions may actually hurt those who have valid habeas claims. According to a 1979 Justice Department study of this problem, a large number of the claims filed are frivolous and repetitous, since many petitions can be filed without cost to the prisoner. The result is that worthy petitions do not get the consideration that they deserve. As Justice Jackson observed, "It must hurt the occasional meritorious petition to be buried in a flood of worthless ones."

The bill contains four provisions, proposals for reform. The first section would redefine the role of the United States magistrates in conducting evidentiary hearings in habeas cases brought by State prisoners. It would specify that magistrates could not conduct such hearings without the consent of the parties to the proceeding.

Today we allow magistrates to make recommended findings of fact which can, in effect, overrule the decisions rendered by State trial judges and approved by State supreme courts. It seems to me that as a sound policy of federalism and of respect for our own State court system, we should require that such findings be based only on hearings conducted by Federal district court judges, appointed and confirmed pursuant to article 3 of the Constitution.

I know that some will be concerned that this provision would have the effect of burdening the dockets of our Federal district courts. In practice, however, the burden which exists today is the number of petitions filed, not the number of hearings held. The latest available statistics show that nationwide U.S. magistrates conduct about 200 hearings in State habeas cases a year.

I am reluctant to increase the case load of the Federal courts in any way; however, this relatively small number of hearings, when balanced against the importance of having such important factual determinations conducted by article 3 judges, makes this modification necessary. Federal magistrates would continue to screen habeas applications and review the State court record and other documents.

Section 2 seeks to set out in statutory form a definition of the "cause and prejudice" standard laid down by the Supreme Court in the *Wainwright* v. *Sykes* case. Both the *Wainwright* decision and this proposal stand for the notion that deference ought to be paid to orderly State court procedures. *Wainwright* specified that a person who has not properly raised claims in the State court trial then should not be able to turn around and raise those claims for the first time in a habeas proceeding unless he shows a valid cause for his failure to follow the State procedures. Section 2 basically codifies the *Wainwright* rule.

The second part of section 2 would create a statute of limitations to assure that habeas claims are filed and considered while the evidence is still fresh. This provision, I believe, is essential if we are going to have any finality in our criminal justice system. Too often claims are filed years and years after the State proceedings have become final. Oftentimes crucial evidence is no longer available or key witnesses are unable to recollect important facts. The result is that the State is prejudiced in its ability to respond to the claims raised, solely because of the long delay in filing of the petition.

The statute of limitations would not begin to run until after the State court conviction becomes final. At that point the prisoner has 3 years in which to file a habeas petition in the Federal courts. That certainly gives ample time to file and assure that claims are heard while the record is still relatively fresh.

Section 3 of the bill contains the fourth proposal, which is designed to insure that findings of fact fairly and properly made in the State court hearing are not needlessly redetermined in a habeas proceeding. It complements the other provisions of this legislation and underscores the need to give deference to orderly State procedures.

Current law creates a presumption that the State court's factual findings are correct. That presumption falls if the habeas petitioner is unable to establish that one of the eight specified defects existed in the State proceedings but a failure to establish one of these defects is not a bar to holding another factual hearing; it simply gives the petitioner the burden of proof in the hearing. The result is that such hearings can be and in fact are held almost at the discretion of the court, regardless of the sufficiency or fairness of the State proceedings. I am not of a mind that this is the way our courts should operate.

Therefore, section 3 changes current law in two ways: First, it tightens up the conditions which trigger a new hearing, to assure that needless factual redeterminations are eliminated; and, second, it specifies that a person must satisfy one of these preconditions in order to get a factual hearing. It takes away the discretion to hold hearings if a person is unable to meet even one of the eight preconditions.

Mr. Chairman, these proposals may not be the only way to address the current situation, and we would certainly be happy to work with you and other experts in this area to redefine them. I do think, however, that we need to look for ways to improve today's system. We need more finality in our criminal justice system; we need to avoid pointless relitigation of stale cases; and we need greater respect for our State court systems. That is essential to maintaining public confidence in our system of justice.

I am not sure that we have that today. In the words of one Supreme Court justice, all too often the State trial is more like a tryout on the road, and you do not get to Broadway until you start filing appeals in the Federal court. All too often we read about someone who is being released as a result of an appeal he filed years or even decades after his original trial. All too often those appeals are purely technical. They do not go to what should be the two fundamental issues in any case: First, was the person filing the appeal innocent; and, second, did that person get a fair trial?

I believe that our State courts are capable of giving fair trials. I believe that if a person does not get a fair trial in the State courts he should be entitled to one in the Federal courts. But I also believe that our criminal justice system cannot serve society if we allow any case to be reopened at any time and on practically any grounds. These beliefs can be balanced in today's system. However, I do not believe that they are now balanced. S. 653 is an attempt to strike a more equitable balance.

Again, I want to thank you very much for conducting these hearings and for the work that the Judiciary Committee is doing in regard to this legislation. Thank you.

Senator **Heflin**. Thank you, Senator Chiles.

[The prepared statement of Senator Chiles follows:]

PREPARED STATEMENT OF SENATOR LAWTON CHILES

Senator Heflin, I am delighted to be here today to testify on S. 653, a bill to reform the Federal habeas corpus statute. I am especially pleased that you are chairing these hearings. Your past service as Chief Justice of the Alabama Supreme Court provides you with invaluable first hand insights into the problems in this area.

We all recognize that proposing changes in the habeas corpus statutes is not an easy thing to do. It is certainly something that we must consider carefully. But over the last few years, several respected judges and legal scholars have called for a re-examination of our present system. Both Justice Black and and Judge Friendly raised various questions about the easy availability of habeas corpus for state prisoners. Jim Smith, Florida's Attorney General, has compiled a study of the use of the habeas corpus remedy over a period of several years. That study pointed to numerous instances of abuse in today's system, and it was the jumping off point for his efforts to reform current law. Earlier this year, Chief Justice Burger, in his speech to the American Bar Association, stressed the need to recognize, "at some point -- finality of judgement" in our criminal justice system.

The bill that Senator Thurmond and I introduced was designed to address some of the problems in the current system. The purpose of the bill is to give greater respect to orderly state court procedures; to assure that habeas corpus cases are considered in a timely manner; and to instill the notion of finality of judgement into our state criminal justice systems.

First, I would like to review the state of affairs today, and then turn to a discussion of S. 653.

The past twenty five years have brought about an explosion in the use of the habeas corpus writ by the state prisoners to attack their state court convictions. The writ itself was first made available to state prisoners by a statute enacted by Congress in 1867. In 1953, in the Brown v. Allen case, the Supreme Court interpreted the 1867 statute in such a way as to give Federal

District Courts broad authority to redetermine the merits of state court convictions. At that time, Justice Jackson expressed deep concern over the "floods of stale, frivolous and repetitious petitions which will swamp the dockets of the lower courts and swell our own: Mr. Justice Jackson's observations have proven all too accurate, as prisoners have taken advantage of the easy availability of access to the Federal courts. In 1953, the flood consisted of 541 petitions. Last year, there were 7,031 such petitions filed by state prisoners in the Federal courts. That represents a thirteen fold increase in the number of petitions filed since 1953. In fact, the total number of state prisoner petitions -- which includes other forms of challenges to the conviction -- now accounts for over eleven percent of the total number of all civil cases filed in the Federal courts today.

I believe that the current state of affairs is harmful to the effective functioning of our courts, and to our criminal justice system. First of all, the easy availability of such review is at odds with one of the most fundamental principles of our judicial system: the notion of finality. Habeas cases relitigate the facts and issues that were decided in the state courts, either at trial or on direct appeal. We all recognize that finality in criminal cases will not carry the same weight it does in civil cases. But it does not follow that finality has no place at all in our criminal justice system. Yet the current system operates in such a way as to suggest that a prisoner, duly convicted in a full and fair state proceeding, can challenge that conviction time and time again, for years or even decades after his state court conviction became "final". Factual issues can end up being re-determined long after the crime was committed and the initial trial was held. In the meantime, evidence may have disappeared or key witnesses may no longer remember crucial details. The state is prejudiced by these long delays, and more importantly, the delays hurt the reliability of the fact finding process. Needless to say, as you well know, extensive Federal court review of state court convictions can create unnecessary friction between the state court system and the Federal courts.

This lack of finality hampers the courts and the criminal justice system in other ways as well. An effective criminal justice system must let would-be criminals know that they will be punished for committing crimes. This deterrence is not effective if prisoners have easy access to the Federal courts to file attacks on their convictions. As a result, the word gets out to would-be criminals that, even of you're caught and get sent to prison, you may not have to serve out your sentence. That message gets out to the public as well, and the result is an erosion of public confidence in the ability of the criminal justice system and the courts to deal with crime. Furthermore, the sheer volume of petitions filed is a strain on the resources of our courts. When our prosecutors, defense attorneys and judges devote their time and efforts to reviewing and processing these petitions, we end up diluting the resources of the courts. We add to the delay in bringing original criminal and civil cases to trial. Ironically, the flood of petitions may actually hurt those who have valid habeas claims. According to a 1979 Justice Department study of this problem, a large number of the claims filed are frivolous and repetitious, since many petitions can be filed without cost to the prisoner. This finding may prevent the worthy petitions from getting the consideration they deserve. As Justice Jackson observed, "(i)t must hurt the occasional meritorious petition to be buried in a flood of worthless ones."

The bill contains four proposals for reform.

The first section would redefine the role of United States magistrates in conducting evidentiary hearings in habeas cases brought by state prisoners. It would specify that magistrates could not conduct such hearings without the consent of the parties to the proceeding. Today, we allow magistrates to make recommended findings of fact which can, in effect, overrule the decisions rendered by state trial judges and approved by state supreme courts. It seems to me that, as a sound policy of federalism and or respect for our own state court systems, we should require that such findings be based only on hearings conducted by Federal district court judges, appointed and confirmed pursuant to Article Three of the Constitution.

I know that some will be concerned that this provision will have the effect of burdening the dockets of our Federal District Courts.

In practice however, the burden which exists today is the number of petitions filed, not the number of hearings held. The latest available statistics show that, nationwide, U.S. magistrates conduct about 200 hearings in state habeas cases a year. I am reluctant to increase the caseload of the Federal courts in any way. However, this relatively small number of hearings, when balanced against the importance of having such important factual determinations conducted by Article 3 judges, makes this modification necessary. Federal magistrates would continue to screen habeas applications, and review the state court record and other documents.

Section 2 seeks to set out, in statutory form, a definition of the "cause and prejudice" standard laid down by the Supreme Court in the Wainwright v. Sykes case. What both the Wainwright decision and this proposal stand for is the notion that deference ought to be paid to orderly state court procedures. Wainwright specified that a person who has not raised claims in the state court trial due to his failure to comply with state procedural rules cannot then turn around and raise those claims for the first time in a habeas proceeding -- unless he shows a valid "cause" for his failure to follow the state procedures. Section 2 basically codifies the Wainwright rule.

The second part of Section 2 would create a statute of limitations, to assure that habeas claims are filed and considered while the evidence is still fresh. This provision, I believe, is essential if we are to have any finality in our criminal justice system. Too often, claims are filed years and years after the state proceedings have become final. Oftentimes, crucial evidence is no longer available, or key witnesses are unable to recollect important facts. The result is that the state is prejudiced in its ability to respond to the claims raised solely because of the long delay in the filing of the petition.

The statute of limitations would not begin to run until after the state court conviction becomes final. At that point, the prisoner has 3 years to file a habeas petition in the Federal courts. This would give a person ample time to file, and assure that claims are heard while the record is still relatively fresh. Section 3 of the bill contains the fourth proposal, which is designed to insure that findings of fact, fairly and properly made in a state court hearing, are not needlessly redetermined in a habeas proceeding. It complements the other provisions of this legislation and underscores the need to give deference to orderly state procedures.

Current law creates a presumption that the state court's factual findings are correct, that presumption falls if the habeas petitioner is able to establish that one of eight specified defects existed in the state proceedings. But a failure to establish one of these defects is not a bar to holding another factual hearing. It simply gives the petitioner the burden of proof in the hearing. The result is that such hearings can be, and in fact are, held almost at the discretion of the court, regardless of the sufficiency or fairness of the state proceeding. I am not of a mind that this is the way our courts should operate.

So Section 3 changes current law in two ways. First, it tightens up the conditions which trigger a new hearing, to assure that needless factual re-determinations are elminated. Second, it specifies that a person must satisfy one of these preconditions in order to get a Federal hearing. It takes away the discretion to hold hearings even if a person is unable to meet the preconditions.

Mr. Chairman, these proposals may not be the only way to address the current situation. I would certainly be happy to work with you and with other experts in this area to refine them. I do think, however, that we need to look for ways to improve today's system. We need more finality in our criminal justice system, we need to avoid pointless re-litigation of stale cases, and we need greater respect for our state court systems. That is essential to maintaining public confidence in our system of justice.

I'm not sure that we have that today. In the words of one Supreme Court justice, all too often, the state trial is more like a tryout on the road, and you don't get to Broadway until you start filing appeals in the Federal courts. All too often, we read about someone who is being released as a result of an appeal filed years or even decades after his original trial. All too often, those appeals are purely technical. They do not go to what should be the two fundamental issues in these cases: first, was the person filing the appeal innocent, and second, did that person get a fair trial. I believe that our state courts are capable of giving fair trials.

I believe that, if a person does not get a fair trial in the state courts, he should be entitled to one in the Federal courts. But I also believe that our criminal justice system cannot serve society if we allow any case to be reopened at any time, and on practically any grounds. These beliefs can be balanced. In today's system, however, I do not believe that they are balanced. S. 653 is an attempt to strike a more equitable balance.

Thank you.

Senator **HEFLIN**. Attorney General Smith, we have one problem. If you do not mind, if we could delay just for a few minutes, the Honorable Jonathan Rose, the Deputy Attorney General, is here and has to be back at the Department of Justice by a certain time. If we could just interrupt and let him come forward, this would be a good time to do it.

Mr. **SMITH**. Certainly.

Senator **HEFLIN**. Mr. Rose, if you would come forward we would be delighted to hear from you. We understand your problem. We try to cooperate with the executive branch of the Government, and sometimes we would like to have a little reciprocity. [Laughter.]

Mr. **ROSE**. Mr. Chairman, I will certainly do my best.

Senator **HEFLIN**. Go ahead.

STATEMENT OF JONATHAN C. ROSE, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY, DEPARTMENT OF JUSTICE

Mr. **ROSE**. I appreciate your courtesy in allowing me to testify, as well as that of the attorney general of the State of Florida. I apologize for having another commitment.

I am very pleased to be here this morning to participate in hearings on S. 653, a bill relating to Federal habeas corpus. In recent months the Department of Justice has been conducting a review of the entire subject of Federal collateral remedies. The Attorney General's task force on violent crime recently suggested changes similar to those proposed in S. 653. While the Department has not yet arrived at a final set of recommendations to make to the Congress on this subject, the areas which we have tentatively identified as standing in need of reform are in most instances the same as those addressed by the bill you are considering today.

I would like to commend this subcommittee, the sponsors of S. 653, and the members of the Attorney General's violent crime task force, as well as Attorney General Smith, for reopening the discussion of the subject of Federal habeas corpus and for underscoring the need for reform in its operation. The remainder of my testimony will be organized as comments on the particular proposals contained in the bill, S. 653.

Section 1 of S. 653, as Senator Chiles has just testified, would bar the use of magistrates to conduct evidentiary hearings in habeas corpus proceedings. At present the law permits magistrates to conduct evidentiary hearings in habeas corpus cases but does not allow magistrates to make findings of fact or effect actual dispositions of cases. Rather, magistrates submit their proposed findings of fact and recommendations to a Federal district court judge.

If the State or a habeas corpus petitioner files written objections to those proposed findings of facts or recommendations, the district court judge must make a de novo determination of the contested matters. As a practical matter we do not, in view of the current procedure, find the use of magistrates to conduct evidentiary hearings in habeas cases to be a significant problem in this area, since the magistrate's function is limited and any contested matter must be determined de novo by a district court judge.

Our concern with section 1 of S. 653 is that the proposed changes would require district court judges personally to conduct evidentiary hearings in any habeas cases in which such a hearing is needed. We believe that such a requirement could add to the work load of the already overburdened Federal courts without bringing about a benefit commensurate with the additional burdens that would be imposed.

Section 2 of S. 653 would effect two changes, as Senator Chiles has also testified, with regard to the current law. The first is a new subsection (d) for 28 U.S.C., section 2244, which would govern situations in which a petitioner raised a claim in a habeas application which had not been properly presented in State proceedings. The new subsection would bar cognition of such claims by a Federal habeas corpus court unless the alleged violation resulted in prejudice to the petitioner and the failure to present the claim properly in State proceedings was caused by one of four specified factors.

The proposed new subsection for 28 U.S.C., section 2244, is similar to the approach taken in *Wainwright* v. *Sykes*. In *Wainwright* the Supreme Court held that certain issues could not be raised by a habeas corpus petition which had not been presented to the State court unless the petitioner could demonstrate actual prejudice resulting from the violation and cause for failure to raise the violation properly in State proceedings.

Section 2 of S. 653 codifies the prejudice requirement and in effect delineates four circumstances in which a district court could find adequate cause for failure to raise a claim in State court. We agree that a codified delineation of such circumstances is highly desirable. Legislative treatment of this subject would resolve the uncertainties that have appeared in the application and interpretation of the cause standard by lower Federal courts.

As a general matter we support the certainty which the new subsection would introduce into the law. We have some reservations, however, concerning the completeness of the four criteria for judging cause which are listed in section 2 of S. 653.

While the grounds stated might all be regarded as adequate grounds for failing to raise a claim, there are also other reasons which seem equally valid that are omitted. Hence, while we agree that S. 653's basic proposal of codifying the concepts of cause and prejudice is appropriate and desirable, we would suggest that a somewhat longer or more flexible list of defining criteria might be considered by this subcommittee.

The second change effected by section 2 of S. 653 would be to create a 3-year statute of limitations which would apply except when a new, retroactively applicable Federal right is recognized after the State court trial. The limitation period would normally run from the time when a defendant's conviction and sentence became final under State law.

There is currently no limit on the time in which an application for a Federal habeas corpus writ may be made, and applications for Federal habeas sometimes occur many years after the normal conclusion of a criminal case. When this happens, the difficulty of adjudicating the particular claims raised in the petition is compounded. The effect of the passage of time on witnesses and evidence may also make retrial of the petitioner difficult or indeed impossible in the event that a writ of habeas corpus is granted.

The current rule governing delay, rule 9(a) of the habeas corpus procedural rules, uses a laches approach that does not assure that adequate weight will be given consistently to the interests supporting finality of judgments. This rule simply authorizes the dismissal of a petition if the prejudice to a State's ability to respond to that petition has resulted from delay, unless the petitioner shows that the delay is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred.

While rule 9(a) allows consideration of prejudice to the State's ability to respond to the petition resulting from delay, it does not allow the court to consider the prejudicial effect the petitioner's delay may have had on the possibility of retrial—as a result, for example, of the intervening death of a key witness or the loss of important evidence on matters unrelated to those raised in the petition.

The Department supports the limitation period proposed in section 2 of S. 653 because it would take the potential profit out of delay in filing. It is needed, moreover, to give finality to a State's judicial action, to conserve judicial resources, and to avoid what can be endless and repetitive litigation.

We would, however, make one comment concerning the current language of this provision: section 2 of S. 653 makes only one exception to the normal running of the limitation period—cases in which a retroactively applicable right is newly recognized following the State court trial. Other circumstances can be imagined, though, in which insistence on compliance with the limitation rule might be unjust. While such situations must obviously be very rare, in light of their possibility we would suggest that rather than singling out a particular circumstance for specific mention, the Congress might add language to allow a court in its discretion to entertain a petition after the normal limitation period has expired, when to do so would be necessary to avoid injustice.

Section 3 of S. 653 would amend 28 U.S.C. 2254(d) to preclude redetermination by a Federal habeas corpus court of a factual issue that has already been decided after a full and fair hearing in the

State court. The clauses in the proposal setting out the conditions under which a factual issue cannot be reexamined are based, with some variation and restriction, on the criteria of the current section 2254(d) which create a rebuttable presumption of the correctness of State court factual findings.

We are in full agreement with the sense of section 3 that reform is necessary in the rules governing redetermination of matters previously adjudicated in State proceedings. We believe, however, that efforts at reform should not focus upon narrowing a Federal court's review of factual issues but should instead focus upon freeing Federal courts of the need to readjudicate all issues of law raised in State proceedings.

By and large, the present scheme for Federal court review of State court factual determination appears to work well. Federal courts currently have discretion whether or not to accept State court findings of fact made after a full and fair hearing, and in practice they have usually deferred to State courts' factual determinations.

Information presently available suggests that Federal habeas corpus courts hold their own evidentiary hearings in at most a few percent of the cases in which they are called upon to review State court judgments. Accordingly, we do not believe that reform of this aspect of the law is needed at the present time.

The Department believes, however, that the reform contemplated by section 3 should address Federal court review of legal questions rather than only Federal court review of factual conclusions reached in State court proceedings. The bill as currently drafted would not alter the rules that presently require automatic redetermination by the Federal habeas corpus court of purely legal questions and mixed questions of law and fact, even where such questions have been fully and fairly explored and decided in State proceedings.

We believe that this requirement reflects unwarranted adverse assumptions concerning the competence and integrity of State courts and is unnecessary for the vindication of Federal rights. The Supreme Court recently testified to the ability and willingness of State tribunals to protect Federal constitutional rights by requiring Federal courts to accord State court judgments collateral estoppel effect in civil rights suits.

We would not, of course, propose that Federal courts be foreclosed from independent determination on those rare occasions in which State courts defy or disregard Federal law. However, the cause of justice is not advanced by a procrustean insistence upon repeated judicial examination of close or unsettled questions of a legal or mixed legal-factual character that frequently yield divergent decisions even among Federal courts.

As Judge Friendly of the second circuit court of appeals has stated:

> My observation of the work of the excellent State courts of New York, Connecticut, and Vermont does not suggest that Federal determination of . . . disputed factual issues and the application of recognized legal standards to ascertained facts . . . is notably better. In the vast majority of cases we agree with the State courts after a large expenditure of judges' and lawyers' time. In the few where we disagree, I feel no assurance that the Federal determination is superior. When I am confident that the issue has received real attention and that the State trial and appellate judges

> have been in accord among themselves, I see no sufficient reason to elevate my views over theirs in a close case.

To correct this situation, we would suggest consideration of a provision giving Federal habeas corpus courts a consistent authorization to decline to entertain claims that have been fully and fairly adjudicated in State proceedings. Such a provision for deference to fair State processes, extending to the decision of questions of law and the application of law to the facts as well as to purely factual issues, would eliminate the need for redundant litigation of claims beyond the point required by considerations of justice or the vindication of Federal rights. It would afford a more appropriate weight to the interest in finality in criminal adjudication and a more appropriate recognition of the status of the State courts as equal partners in the application and interpretation of Federal law.

Justice O'Connor, a former State trial and appellate judge, has staunchly defended the ability and readiness of State courts to protect constitutional rights in supporting deference to State court judgments:

> If our Nation's bifurcated judicial system is to be retained, as I am sure it will be, it is clear that we should strive to make both the Federal and State systems strong, independent, and viable. State courts will undoubtedly continue in the future to litigate Federal constitutional questions. State judges in assuming office take an oath to support the Federal as well as the State constitution. State judges do in fact rise to the occasion when given the responsibility and opportunity to do so. It is a step in the right direction to defer to the State courts and give finality to their judgments on Federal constitutional questions where a full and fair adjudication has been given in the State court.

In closing, I would again like to express my appreciation to the subcommittee and the sponsors of this bill for focusing public attention on this important subject. We endorse many of the concepts incorporated in S. 653 and agree that the bill identifies a number of areas in which reform is desirable. We expect to forward to the subcommittee, after some further study, a formal letter of transmittal finalizing our recommendations for Federal habeas corpus reform and explaining the rationale and intended interpretations of the amendments we will be advancing.

Thank you very much, Mr. Chairman.

Senator **Heflin**. Thank you, Mr. Rose.

I understand you are on a tight schedule, and we might want to submit some questions in writing. It may well be that there are additional hearings on this. I appreciate your testimony.

Mr. **Rose**. Thank you, Mr. Chairman.

Senator **Heflin**. Mr. Velde?

Mr. **Velde**. Chairman Thurmond has indicated that this bill has top priority as far as processing by the Judiciary Committee. Could you give us any estimate as to when the Department's proposal might be forthcoming?

Mr. **Rose**. We have our executive branch clearance procedure which I know, Mr. Counsel, that you are well familiar with. However, we will certainly try to meet whatever schedule this committee has within the next month or month and a half, if that would be appropriate.

Mr. **Velde**. Thirty days?

Mr. **Rose**. We will certainly attempt to meet that schedule.

Mr. **Velde**. Before the snow falls?

Mr. Rose. I don't think we can guarantee that, as cold as it is this morning. [Laughter.]

Mr. Velde. Thank you very much.

Mr. Rose. Yes, sir.

Senator Heflin. Of course, we are all interested in the integrity of the judicial process and the finality, but I basically come out of your testimony believing that you would change the language, without much result. Am I correct in that the end result of what your testimony has been today is that it is going to be basically a change of language but pretty well the end result on the statute of limitations you leave to the judges' discretion? I do not really see where, from your testimony, you are really getting at the heart of this problem. If this is going to be the administration's position I do not believe you are going to do much other than make a language change.

Mr. Rose. Well, I do not think that is correct, Mr. Chairman. By giving a set of standards with regard to clear areas where courts have obvious ability to dismiss these frivolous petitions, and by giving discretion in the area of the statute of limitation, we certainly do not intend to have that be a loophole which forces a court to consider these petitions after the 3-year period has passed. We simply would give an escape valve so that in the very rare case where a claim might not have been timely raised, that the statute would not exist as an absolute bar.

I think that the whole thrust of this proposal would give Federal courts much more assurance and ability to dispose rapidly of these claims than they have today. If you have any particular areas, though, where you think we should focus our further efforts, I would be glad to respond to them.

Senator Heflin. We will be sending some written questions and you may respond to them. However, I think this is a serious problem.

Mr. Rose. So do we.

Senator Heflin. Maybe the attorney general from Florida can point out that under this situation you have had prisoners who just constantly, continuously are filing these petitions. There have been instances where there have been at least hearings that have been held after a State court has gone through its trial and its appellate process.

The object is to try to bring some finality but at the same time to protect constitutional rights. However, this is a serious problem that continues to confront us. We are all interested in protection of constitutional rights but there does have to be, at some time, some finality in regard to these matters.

However, I really get the feeling from your testimony that we are making a lot of language change but I do not know whether we are making any result changes.

Mr. Rose. Well, it is certainly not our objective just to make language changes because, Mr. Chairman, we quite agree with you that, No. 1, we are spawning generations of writ-writers in our prisons. The fact of the matter is that with regard to Federal courts and also U.S. Attorneys' offices, they are very much overburdened with regard to responding to what are—in the vast number of writs that are filed, petitions that are filed—frivolous claims. It is not our intent simply to support language changes but we want to make changes in substantive result.

Senator HEFLIN. Thank you, sir. We appreciate it. We will be submitting some more questions.

Mr. ROSE. Thank you, sir.

[The prepared statement of Mr. Rose follows:]

PREPARED STATEMENT OF JONATHAN C. ROSE

Mr. Chairman, I am very pleased to have the opportunity to appear before the Subcommittee this morning to participate in hearings on S. 653, a bill relating to federal habeas corpus.

In recent months, the Department of Justice has been conducting a review of the subject of federal collateral remedies. The Attorney General's Task Force on Violent Crime recently suggested changes similar to those proposed in S. 653. While the Department has not yet arrived at a final set of recommendations, the areas which we have tentatively identified as standing in need of reform are in most instances the same as those addressed by S. 653. I would like to commend this subcommittee, the sponsors of S. 653, and the members of the Attorney General's Violent Crime Task Force for re-opening discussion of the subject of federal habeas corpus, and for underscoring the need for reform in its operation.

The remainder of my testimony will be organized as comments on the particular proposals contained in S. 653.

I. Section I: Barring the Use of Magistrates to Conduct Evidentiary Hearings in Habeas Cases

Section 1 of S. 653 would bar the use of magistrates to conduct evidentiary hearings in habeas corpus proceedings.

At present, the law permits magistrates to conduct evidentiary hearings in habeas corpus cases, but does not allow magistrates to make findings of fact or effect actual dispositions of cases. Rather, magistrates submit their proposed findings of fact and recommendations to a federal district judge. If the state or a *habeas corpus* petitioner files written objections to those proposed findings or recommendations, the district judge must make a *de novo* determination of the contested matters. [1]

As a practical matter, we do not, in view of the current procedure, find the use of magistrates to conduct evidentiary hearings in habeas cases to be a significant problem in this area, since the magistrate's function is limited and any contested matter must be determined *de novo* by a district court judge. Our concern with section 1 of S. 653 is that the proposed changes would require district court judges personally to conduct an evidentiary hearing in any habeas case in which a hearing is needed. We believe that such a requirement could add to the workload of the already over-burdened federal courts without bringing about a benefit commensurate with the additional burdens that would be imposed.

II. Section 2: Extending and Codifying the Rule of Wainwright v. Sykes

Section 2 of S. 653 would effect two changes in the current law. The first is a new subsection (d) for 28 U.S.C. § 2244 which would govern situations in which a petitioner raises a claim in a *habeas corpus* application which has not been properly presented in state proceedings.

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[1] In a recent decision construing this procedure, the Supreme Court held that the statute does not require that a judge personally conduct an evidentiary hearing if a magistrate has already done so. *United States v. Raddatz*, 447 U.S. 667 (1980).

The new subsection would bar cognition of such claims by a federal habeas corpus court unless the alleged violation resulted in prejudice to the petitioner, and the failure to present the claim properly in state proceedings was caused by one of four specified factors.

The proposed new subsection for 28 U.S.C. § 2244 is similar to the approach of Wainwright v. Sykes, 443 U.S. 72 (1977). In Wainwright, the Supreme Court held that certain issues could not be raised by habeas corpus petition which had not been presented to the state court unless the petitioner can demonstrate "actual prejudice" resulting from the violation and "cause" for failure to raise it properly in state proceedings. Section 2 of S. 653 codifies the "prejudice" requirement and, in effect, delineates four circumstances in which a district court could find adequate "cause" for failure to raise a claim in state court. We agree that a codified delineation of such circumstances is highly desirable. Legislative treatment of this subject would resolve the uncertainties that have appeared in the application and interpretation of the "cause" standard by the lower federal courts. [2/]

As a general matter, we support the certainty which the new subsection would introduce into the law. We have reservations, however, concerning the completeness of the four criteria for judging cause which are listed in section II of S. 653. While the grounds stated might all be regarded as adequate grounds for failing to raise a

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[2/] See generally Goodman & Sallett, Wainwright v. Sykes: The Lower Federal Courts Respond, 30 Hastings L.J. 1683, 1707-24 (1979).

claim, there are also other reasons which seem equally valid that are omitted. Hence, while we agree that S. 653's basic proposal of codifying the concepts of "cause" and "prejudice" is both appropriate and desirable, we would suggest that a somewhat longer or more flexible list of defining criteria be considered.

III. Section 2: Imposing a Three Year Statute of Limitation

The second change effected by section 2 of S. 653 would be to create a three-year statute of limitation, which would apply except when a new, retroactively applicable federal right is recognized after the state court trial. The limitation period would normally run from the time when a defendant's conviction and sentence became final under state law.

There is currently no limit on the time within which an application for federal habeas corpus may be made, and applications for federal habeas sometimes occur many years after the normal conclusion of a criminal case. [3/] When this happens, the difficulty of adjudicating the particular claims raised in the petition is compounded. The effect of the passage of time on witnesses and evidence may also make re-trial of the petitioner difficult or impossible in the event that a writ of habeas corpus is granted.

The current Rule governing delay -- Rule 9(a) of the habeas corpus procedural rules -- uses a "laches"

[3/] See Paul H. Robinson, An Empirical Study of Federal Habeas Corpus Review of State Court Judgments 42 (Dept. of Justice 1979).

approach that does not ensure that adequate weight will consistently be given to the interests supporting finality. The Rule simply authorizes dismissal of a petition if prejudice to the state's ability to respond to the petition has resulted from delay, unless the petitioner shows that the delay is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred. [4/] While Rule 9(a) allows consideration of prejudice to the state's ability to respond to the petition resulting from delay, it does not allow the court to consider the prejudicial effect the petitioner's delay may have had on the possibility of re-trial -- as a result, for example, of the intervening death of a key witness, or the loss of important evidence, on matters unrelated to those raised in the petition.

The Department supports the limitation period proposed in section II of S. 653, because it would take the potential profit out of delay in filing. It is needed, moreover, to give finality to the state's judicial action, to conserve federal judicial resources and to avoid what can be endless and repetitive litigation.

We would, however, make one comment concerning the current language of this provision. Section 2 of S. 653 makes only one exception to the normal running of the limi-

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[4/] In the original version issued by the Supreme Court, Rule 9(a) also created a rebuttable presumption of prejudice to the state in connection with petitions filed more than five years after the judgment of conviction or the post-conviction action of the state challenged in the petition. See generally Clinton, Rule 9 of the Federal Habeas Corpus Rules: A Case Study of the Need for Reform of the Rules Enabling Acts, 63 Iowa L. Rev. 15, 23-24, 46-47 (1977).

tation period -- cases in which a retroactively applicable right is newly recognized following the state court trial. Other circumstances can be imagined, though, in which insistence on compliance with a limitation rule would be unjust. While such situations must obviously be very rare, in light of their possibility we would suggest that, rather than singling out a particular circumstance for specific mention, Congress add language to allow a court, in its discretion, to entertain a petition after the normal limitation period has expired when to do so would be necessary to avoid injustice.

IV. Section 3: Precluding an Evidentiary Hearing on a Factual Issue That Has Been Decided After a Full and Fair Hearing in State Court.

Section 3 of S. 653 would amend 28 U.S.C. § 2254(d) to preclude re-determination by a federal *habeas corpus* court of a factual issue that has been decided after a full and fair hearing in state court. The clauses in the proposal setting out the conditions under which a factual issue cannot be re-examined are based, with some variation and restriction, on the criteria of current § 2254(d) which create a rebuttable presumption of correctness of state court factual findings. We are in full agreement with the sense of section 3 of S. 653 that reform is necessary in the rules governing re-determination of matters previously adjudicated in state proceedings. We believe, however, that efforts at reform should not focus upon narrowing a federal court's review of factual issues, but instead upon freeing federal courts of the need to re-adjudicate all issues of law raised in state proceedings.

By and large, the present scheme for federal courts' review of state courts' factual determinations appears to work well. Federal courts currently have discretion whether or not to accept state courts' findings of fact made after a full and fair hearing, and in practice they have usually defered to state courts' factual determinations. Information presently available suggests that federal habeas corpus courts hold their own evidentiary hearings in at most a few percent of cases in which they are called upon to review state court judgments. [5] Accordingly, we do not believe that reform of this aspect of the law is needed at this time.

The Department believes, however, that the reform contemplated by section 3 of S. 653 should address federal court review of legal questions rather than only federal court review of factual conclusions reached in state proceedings. The bill as presently drafted would not alter the rules that presently require automatic re-determination by the federal habeas court of purely legal questions and mixed questions of law and fact, even where such questions have been fully and fairly explored and decided in state proceedings. [6]

We believe that this requirement reflects unwarranted adverse assumptions concerning the competence and integrity of state courts, [7] and is unnecessary for the vindication of federal rights. The Supreme Court recently testified to the ability and willingness of state tribunals to protect federal consitutional rights by requiring federal courts to accord state judgments collateral estoppel effect in civil rights suits. [8] We would not, of course, propose that the federal courts be foreclosed from independent determination on those rare occasions in which state courts defy or disregard federal law. However, the cause of justice is not advanced by a procrustean insistence on repeated judicial examination of close or unsettled questions of a legal or mixed legal-factual character that frequently yield divergent decisions even among the federal courts. As Judge Friendly of the Second Circuit Court of Appeals has stated:

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[5] See Robinson supra n.3, at 22 (finding of extensive empirical study that evidentiary hearings were held in 2.2% of habeas cases in sample studied). See also Report of the Proceedings of the Judicial Conference of the United States and Annual Report of the Director of the Administrative Office of the United States Courts 389, Table C-4 (1980) (categorizing 2.0% of habeas corpus petitions as "reaching trial").

[6] See Townsend v. Sain, 372 U.S. 293, 318 (1963); Brown v. Allen, 344 U.S. 443, 506-08 (1953) (opinion of Frankfurter, J.); Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4265, at 658-60 and nn. 11-12 (1978).

> My observation of the work of the excellent state courts of New York, Connecticut and Vermont does not suggest that federal determination of . . . [disputed factual issues and the application of recognized legal standards to ascertained facts] . . . is notably better [than a state court determination]. In the vast majority of cases we agree with the state courts, after a large expenditure of judges' and lawyers' time. In the few where we disagree, I feel no assurance that the federal determination is superior. When I am confident that the issue has received real attention and the state trial and appellate judges have been in accord among themselves, I see no sufficient reason to elevate my views over theirs in a close case. [9]

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[7] See Stone v. Powell, 428 U.S. 465, 493-94 n. 24 (1976).

[8] See Allen v. McCurry, 449 U.S. 90 (1980).

[9] Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 165 n. 125 (1970).

To correct this situation, we would suggest consideration of a provision giving federal habeas courts a consistent authorization to decline to entertain claims that have been fully and fairly adjudicated in state proceedings. Such a provision for deference to fair state processes -- extending to the decision of questions of law and the application of the law to the facts, as well as to purely factual issues -- would eliminate the need for redundant litigation of claims beyond the point required by considerations of justice or the vindication of federal rights. It would afford a more appropriate weight to the interest in finality in criminal adjudication, and a more appropriate recognition of the status of the state courts as equal partners in the application and interpretation of federal law. Justice O'Connor, a former state trial and appellate judge, has staunchly defended the ability and readiness of state courts to protect constitutional rights in supporting deference to state court judgments:

> If our nation's bifurcated judicial system is to be retained, as I am sure it will be, it is clear that we should strive to make both the federal and the state systems strong, independent, and viable. State courts will undoubtedly continue in the future to litigate federal constitutional questions. State judges in assuming office take an oath to support the federal as well as the state constitution. State judges do in fact rise to the occasion when given the responsibility and opportunity to do so. It is a step in the right direction to defer to the state courts and give finality to their judgments on federal consitutional questions where a full and fair adjudication has been given in the state court. 10/

10/ O'Connor, Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge, 23 William and Mary L. Rev. 801 (1981).

V. Conclusion

In closing, I would again like to express my appreciation to the Subcommittee and the sponsors of this bill for focusing public attention on this important issue. We endorse many of the concepts incorporated in S. 653, and agree that the bill identifies a number of areas in which reform is desirable. We would expect to forward to the Subcommittee, after some further study, a formal letter of transmittal finalizing our recommendations for habeas corpus reform, and explaining the rationale and intended interpretation of the amendments we will be advancing.

I would be pleased to answer any questions the Subcommittee may have.

Senator HEFLIN. General Smith, if you will come back—I did not realize, Senator Chiles, you were interested in staying the whole time.

Senator CHILES. I have to leave in just a minute. I just wanted to hear him.

Senator HEFLIN. All right.

Your whole statement will be put into the record, and we would appreciate if rather than reading it, you would summarize your statement. That is true of all witnesses.

STATEMENT OF JIM SMITH, ATTORNEY GENERAL, STATE OF FLORIDA

Mr. SMITH. Thank you, Mr. Chairman.

I would like to take this opportunity to commend Senator Chiles for the leadership that he has given in this area. We in Florida are proud of the effort he is making here, not only on habeas corpus but the great work he has done in trying to bring us a national policy to right the importation of illegal drugs into this country. He is doing a super job.

As attorney general, everywhere I go I get the question from my constituents: What can we do, what can be done to make the criminal justice system work better? With your background, I am sure you know as I do that there are no quick fixes out there. There are no easy solutions that we can come to. Making progress in this area is very difficult.

I cannot think of anything, though, that could help the improvement of the criminal justice process in this country to make it more efficient, anything more that we could do than pass these four amendments. They would, I believe, go a long way to beginning to restore a great deal of public confidence that has been lost in a system where people just cannot understand—and frankly we as lawyers sometimes have diffculty understanding—after an individual has been convicted, why it takes 6, 7, 8, 9 years sometimes to see that justice is carried out.

To those who will, I am sure, come before this committee and plead that we cannot tamper with the great writ, I submit that if the political process and those of us who are in it do not do some things to make the process work more efficiently and fairly for all of our citizens, we are going to, at some point in time, begin to see a political reaction in this country that will begin to run over some basic rights that we all have and that I certainly would hate to see us lose.

The writ was designed as a shield against overzealous prosecutors and other abuses by State courts. However, I think all of us would have to admit we cannot recognize it as accomplishing that today. It has been converted from its original purpose into a device that allows defense attorneys to repeatedly allege every violation of Federal rights that could conceivably be related to denial of a fair trial, yet these same trials have been found valid on appeal to the highest State courts and in many instances allowed to stand by the U.S. Supreme Court.

In 1941 only 127 petitions were filed in Federal district courts. By 1980 that number had exceeded 8,000, but, what is important, only 3.2 percent of that number resulted in any relief. It is obvious that in a preponderance of cases which I would classify as abuses of the writ, the intent is not to right a wrong but to forestall imposition of sentence or take advantage of circumstances such as the death of a key witness to overturn a lawful sentence.

In *Holzapfel* v. *Wainwright,* a Florida case, the defendant waited 21 years to challenge the voluntariness of a confession and guilty plea, filing the petition after the death of two vital State witnesses. In *Jackson* v. *Estelle,* the petition was filed 30 years after the conviction, alleging trial error by the defense counsel. In *Walker* v. *Wainwright,* another Florida case, a defendant who had served 30 years after pleading guilty to child rape and who had been denied one writ on his claim of a coerced confession, succeeded with a new petition contending that his counsel—who was then deceased—was ineffective.

States obviously cannot defend themselves in such actions when witnesses and principals are missing or dead or have long since lost their recollection of the events that might have taken place. Moreover, when convictions are occasionally set aside many years later, retrial of the defendant is difficult if not impossible.

The abuses that go unnoticed in thousands of petitions for habeas relief are graphically evident in capital cases, in which loopholes are used to seek stays in any available Federal court, always at the 11th hour. In one such case, the U.S. Supreme Court granted review, heard and dismissed the argument. Subsequently a death warrant was issued and a stay granted on application for the writ. This habeas action is 2½ years old, now in Federal court on appeal of the district judge's order upholding the judgment and sentence. If we have capital punishment laws but no capital punishment, the intended deterrent cannot exist, yet there are numerous cases in Florida similarly stalled by Federal appeals—as a matter of fact, about 22 capital cases now.

I want to emphasize that these amendments do not weaken the writ. They do not take away anyone's rights. They do not cut off legitimate claims. They simply require timely and orderly appeals and insure that the judgments and findings of State courts receive proper weight in the federal system. A 3-year statute of limitations would be placed on Federal review of State court convictions to get these cases decided on a timely basis when all of the elements of the original trial are available.

I would agree, I think, with the sense of the comments you were making to the gentleman from the Justice Department: To have a 3-year statute of limitations but then say that the district court could consider facts or elements necessary to avoid injustice would just put us in a situation where every petition would dwell on that. I think we have to bite the bullet, and if we are going to have finality, have finality. There are collateral avenues open in all of our States for those situations that may occur, but I think we owe it to the public to, as I say, have finality if we are serious about solving this problem.

There would be a prohibition of litigating issues in Federal court that were not raised in State court unless they could not have been raised, either because they could not have been known or because the State improperly barred them. Federal courts would no longer be able to hold evidentiary hearings on facts fully and fairly determined in State court, and could intercede only when such standards were not met.

Federal judges would be required to preside at evidentiary hearings in cases initiated by State prisoners. Currently magistrates conduct many such hearings, in some cases in practical effect overruling decisions of State courts and State supreme courts or requiring a third hearing before a Federal district judge. Simply stated, we feel very strongly—and I have talked with the chief justice of our supreme court about this several times—that judges, not magistrates, ought to be involved in reviewing other judges' decisions.

I would like to say here that Judge Griffin Bell, on the violent crime task force that he chaired, made a recommendation that when a Federal district court judge feels there is a necessity for an evidentiary hearing, we ought to return that matter to the State trial court and have the hearing done there, and then back to the Federal court for review.

Unless we intend to go to a two-trial system of criminal justice, the competency and fairness of State courts must be recognized. The use of the writ to second-guess State convictions on spurious grounds has fostered disrespect for the law and had an adverse impact on the administration of justice and public confidence in and respect for the system. As Judge Bell aptly put it, no criminal offender has any reason to accept his guilt so long as he can endlessly contest the judgment and sentence of the court.

I urge your favorable vote on these amendments which have received the endorsement of the National Governors' Association, the National Association of Attorneys General, the National Conference of Chief Justices, and the violent crime task force appointed by Attorney General William French Smith.

I am sure that the subcommittee will hear from opponents of this legislation that the writ of habeas corpus is a fundamental right unique to the legal system of a free people which should not be tampered with under any circumstances. I would suggest to them that the writ has already been tampered with and by these amendments we seek to restore it. As Justice Jackson said, those who sanction abuse of the writ are its real enemies.

Thank you. I will be happy to answer questions.

Senator HEFLIN. In this matter of the statute of limitations, we are speaking of the statute of limitations applicable to the Federal court jurisdiction. I believe that almost every State has an escape provision if, for example, someone 20 years later confesses that they committed the crime and an injustice was done, or if something turns up that would cause a person to really have to seek relief.

I think most States have these, but in a statute of limitations, if it could be written that in the event that there was no provision available, then under those circumstances, the Federal court could entertain a jurisdiction or something of this sort; it might cure the problem.

Mr. SMITH. Yes, sir.

Senator HEFLIN. We do not want any innocent person to serve or anything of this sort but the idea is that you and I and some of us have seen this thing operate: You get the typical jailhouse lawyer who is doing nothing in a State penitentiary, and he files for all of them. It is almost like a machine. As I understand it, if you looked at the petitions, the same language appears in every one. It is all written by one person, and everybody wants to do it. However, the statute of limitations would mean that they would have to do this expeditiously. With some sort of a provision like that, in the event that there was no State remedy available, then, of course, there could be an exception to that.

Mr. SMITH. In Florida, you would file a 3.850 petition in that situation, and the other relief that I think would be available in virtually every State would be to go to either a pardon board, or in Florida we call it our clemency board, to have those situations reviewed there. However, there should be some kind of an escape valve in the unlikely event that some State would not have in their criminal rules or by statute some avenue for collateral review.

Senator HEFLIN. You mentioned the magistrate participation. I hear a lot—say a nine-man supreme court of a State that ends up having made a decision, gone through the State process, and then a magistrate would have the authority to reverse that whole State procedure basically by the fact that he hears it. That is one of the reasons that a great number of the State judges have opposed it.

Mr. SMITH. Well, our practical experience has been that—and unfortunately a lot of the attention on habeas manifests itself in death cases but obviously it really impacts the system to a much greater extent than just that—but we have found that in the cases where the district court judge holds the hearing, that they move very much faster than those situations where it is referred to a magistrate. We find that magistrates for whatever reason—probably workload—take a very long time to get to those cases, and it has been frustrating to us.

I think Judge Bell's suggestion, though, that when the district court determined there was a need for an evidentiary hearing, to refer that back to the State trial court and request them to hold it and then refer the findings back to the Federal district court might really solve the problem in a much better way than we have even suggested. Interestingly, too, two of the districts in our State have now with their own rule determined that in capital cases, the judges will keep the cases and not refer them to magistrates.

Senator HEFLIN. Mr. Velde?

Mr. VELDE. General Smith, I wonder, do you have any statistics available as far as the Florida experience on the percentage of your incarcerated felons or other inmates filing Federal writs?

Mr. SMITH. I could get you specific numbers. I do not have those with me but I could get you specific numbers and also the very small percentage that ultimately receive any relief. I will get those for you.

Mr. VELDE. Just off the top of the head, it appears——

Mr. SMITH. It is in the hundreds.

Mr. VELDE. Yes. It appears that, at any given time, there are somewhere around 200,000 incarcerated felons in State systems, and if there are 7,000 petitions, that is somewhere around 3.5 percent. Of those petitions, 2 percent actually go to trial before a Federal magistrate or judge.

Therefore, in terms of any criminal court workload, caseload, at the State and local level, it appears these writs are not a significant factor. Would that be a fair assessment?

Mr. SMITH. For some reason, more of these writs are filed in the South than other parts of the country. I know, in talking to other attorneys general around the country, they do not seem to have the problem that we do. It is a heavy burden in our State. I guess I have four, maybe five lawyers that work about full time on this. I do not know why it is that way, that the South seems to have more of these filed than other parts of the country, but that is a fact.

Again, one of my concerns is—because of the heavy volume that we experience—that some legitimate claims may slip through the crack. I think that is the reason it is important to streamline it to the point that those matters that should be considered are considered but matters which are obviously frivolous and obviously not going to result in any relief really should not be considered.

I think Federal district court judges will tell you it takes up a great deal of their time. In fact, many have expressed to me that the volume has been so great and increasing that sometimes they do not feel that they are giving them the kind of look that perhaps they should.

Mr. VELDE. Just one other question, Mr. Chairman.

Testimony received before this subcommittee earlier this year indicates that the Federal courts in Florida and particularly in the Miami area are extremely overburdened. In fact, this subcommittee is considering the creation of at least two and possibly three additional Federal judgeships in that area.

Mr. SMITH. Right. There is no question, our State continues to have a very significant growth rate. We are still getting about

300,000, over 300,000 new residents a year in Florida. With the drug problems in our State and the litigation arising from that, Federal courts are badly, badly overcrowded.

Mr. **Velde**. Really your testimony suggests, however, that these overworked Federal judges apparently are able to deal with the prisoner writs more efficiently than magistrates.

Mr. **Smith**. That is in capital cases, and I am sure it is a result of Governor Graham and I making the public statements that we have, and our frustration with the time delays that we have had to experience. I know in a recent death case Judge Hodge gave a very considered statement about the dilemma that the Federal district court judges find themselves in, in the way the statute is worded now. It is his belief that even if these things are frivolous or they feel they are frivolous, they are required to take them under consideration.

I would like to make available to the committee part of that opinion because I think he states very eloquently the dilemma that the court finds itself in. I sensed in his opinion that he was asking for help. They feel a very strong responsibility. I know my lawyers do not agree with that interpretation, but he is the judge and the way he reads the statute, he feels that they have that responsibility to review these cases.

Mr. **Velde**. Thank you, Mr. Chairman.

Senator **Heflin**. We would enter the statement of Gov. Bob Graham of Florida, who has filed a statement with us, and it will be made a part of the record.

So far this seems to be "Florida day."

Mr. **Smith**. Well, we have the problem. Thank you, Mr. Chairman.

[The prepared statement and additional submissions of Mr. Smith follow:]

PREPARED STATEMENT OF JIM SMITH

Mr. Chairman . . . members of the subcommittee.

I am grateful for the opportunity to testify in support of Senate Bill 653, which proposes a series of amendments to the federal criminal code relating to the writ of habeas corpus.

These amendments address abuses of the criminal justice process that have become so common today as to be virtually codified as a method of endlessly appealing state criminal court convictions.

The result is that we are denied the sanctions of the criminal law, often on grounds unrelated to the question of guilt or innocence. By any definition this is an intolerable distortion of justice that must come to an end, particularly at a time when our nation is being overrun by crime.

The federal government and many states . . . including Florida . . . have conducted sweeping studies of criminal justice in an effort to determine what must be done to protect society from rising crime rates.

The closer presence of crime today . . . and its turn toward greater violence . . . has set off a nationwide re-evaluation of the evolution of defendants' rights to determine whether there are now so many protections for the accused that the system has lost the ability to enforce its criminal laws.

Chief Justice Burger . . . in his annual report to the American Bar Association . . . asked whether a society is redeemed if it provides massive safeguards for accused persons, but cannot provide elementary protection for its decent, law-abiding citizens.

This same question is one I hear often in Florida from citizens who are outraged over crime and disgusted by the system's apparent inability to deliver on its criminal penalties.

We all recognize that swift and sure punishment is the essential deterrent of the criminal law. But unless we restore finality to the judgments of our courts . . . achieving what Justice Harlan called "a visible end" to the process . . . we cannot expect to protect society from criminal offenders.

That process must begin by reaffirming the authority of state courts. And the first step is return a proper balance to the writ of habeas corpus.

I have no argument with the many procedural safeguards won by criminal defendants in rulings such as Gideon and Miranda, which ensure fair trials.

But I do not agree with the extension of any such rights beyond due process and fairness to fashion a tool with which to frustrate . . . or duplicate . . . the administration of justice in state courts.

This is what we have today in the expanded scope of the writ of habeas corpus.

The writ was designed as a shield against overzealous prosecutions and other abuses by state courts, but would scarcely be recognized in that role today.

The writ has become an opportunity for full-blown review of all state court felony convictions to challenge alleged errors of search, arrest or trial years or decades after they occurred.

It has been converted from its original purpose into a device that allows defense attorneys to repeatedly allege every violation of federal rights that could conceivably be related to denial of a fair trial.

Yet these same trials have been found valid on appeal in the highest state courts and . . . in many instances . . . allowed to stand by the United States Supreme Court.

The number of petitions filed in recent years . . . since the scope of the writ was expanded by the Warren court . . . is evidence itself of the success of some of these claims.

In 1941, only 127 petitions were filed in federal district courts. By 1980, that number had exceeded eight thousand. Yet only 3.2 percent resulted in any relief.

It is obvious that in a preponderance of cases . . . which I would classify as abuses of the writ . . . the intent is not to right a wrong but to forestall imposition of the sentence or take advantage of circumstances, such as the death of a key witness, to overturn a lawful sentence.

In Holzapfel v. Wainwright, the defendant waited 21 years to challenge the voluntariness of a confession and guilty plea, filing the petition after the death of two key state witnesses.

In Jackson v. Estelle, the petition was filed 30 years after the conviction, alleging trial error by the defense counsel.

In Walker v. Wainwright, a defendant who had served 30 years after pleading guilty to child rape, and who had been denied one writ on his claim of a coerced confession, was successful with a second contending that his counsel, by then deceased, was ineffective.

States obviously cannot defend themselves in such actions when witnesses and principals are missing or dead, or have long since lost any recollection. Moreover, when convictions are occasionally set aside many years later, retrial of the defendant is difficult, if not impossible.

The abuses that go unnoticed in thousands of petitions for habeas relief are graphically evident in capital cases, in which loopholes are used to frustrate imposition of the sentence.

In one such case the U. S. Supreme Court granted review, heard and dismissed the argument. Subsequently a death warrant was issued and a stay granted on application for the writ.

This habeas action is now two and a half years old, currently in federal circuit court on an appeal of the district judge's order upholding the judgment and sentence.

If we have capital punishment laws but no capital punishment, the intended deterrent will not exist. Yet there are numerous cases in Florida similarly stalled by federal appeals.

These amendments do not weaken the writ.

They do not take away anyone's rights.

They do not cut off legitimate claims.

They simply require timely and orderly appeals and ensure that the judgments and findings of state courts receive proper weight in the federal system.

A three-year statute of limitations would be placed on federal review of state court convictions to get these cases decided on a timely basis, when all of the elements of the original trial are available.

There would be a prohibition on litigating issues in federal court that were not raised in state court, unless they could not have been raised . . . either because they could not have been known or because the state improperly barred them.

Federal courts would no longer be able to hold evidentiary hearings on facts fully and fairly determined in state court . . . and could intercede only when such standards were not met.

Federal judges would be required to preside at evidentiary hearings in cases initiated by state prisoners. Currently, magistrates conduct many such hearings, in some cases, in practical effect, overruling decisions of state supreme courts or requiring a third hearing before a federal district judge.

Unless we intend to go to a two-trial system of criminal justice, the competency and fairness of state courts must be recognized.

Use of the writ to second-guess state convictions on spurious grounds has fostered disrespect for the law and had an adverse impact on the administration of justice and public confidence and respect in the system.

As Judge Griffin Bell aptly put it, no criminal offender has reason to accept his guilt so long as he can endlessly contest the judgment and sentence of the court.

The United States Supreme Court itself is now veering away from these expansive interpretations because, in my opinion, it no longer doubts the ability of state courts to dispose of federal claims competently and fairly.

In 1979, Justice Powell wrote that overextension of habeas corpus by federal district courts threatens the federal system and the principle of primary state jurisdiction over criminal laws that the supreme court itself has repeatedly asserted.

In Justice Powell's words, and I quote:

"The review by a single federal district court judge of the considered judgment of a state trial court, an intermediate appellate court, and the highest court of the state, necessarily denigrates those institutions."

I would agree with that and urge your favorable vote on these amendments, which have received the endorsement of the National Governors Association, the National Association of Attorneys General, the National Conference of Chief Justices and the violent crime task force appointed by Attorney General William French Smith.

I would also agree with Attorney General Smith's statement to the Criminal Law Subcommittee of the Senate last month, to the effect that while it is important to guard against wrongful convictions, it is wasteful to provide additional review without cause to believe that the result will be more just.

The task force has recommended one change in 653 with which I strongly concur. This is the proposal that affords the state court the opportunity to conduct evidentiary hearings when, in the judgment of a district court, such hearings are necessary.

In such cases the factual findings of the state court would be transmitted to the district court for use in reaching conclusions of law. The district court could not substitute its own findings for those of the state court.

This would fully protect the rights of prisoners, eliminate duplicative evidentiary hearings and end a severe source of friction between state and federal courts.

I recommend that the following language be added to Section 1 of S. 653 to accomplish this:

> If the district judge determines that an evidentiary hearing is necessary in cases brought pursuant to §2254 of this title, he shall enter an order permitting said hearing to be conducted by the state court that imposed the judgment and sentence. However, should the state court decline to do so, then the district judge shall proceed with said evidentiary hearing.

There are several other technical changes to S. 653 which I recommend. These changes conform S. 653 to its companion bill H.R. 3416 and were received from interested parties, including judges, who reviewed this legislation in its proposed form. These are as follows:

In Section 2, paragraph (d), line 14, the word "not" should be inserted after the word "and" so that the phrase reads "or properly presented in a collateral proceeding and not disposed of exclusively on the merits."

In Section 2, paragraph (3), line 11, after the word "law," insert "or the date on which appellate review of such judgment and sentence has been concluded" so that the phrase reads "if it is not filed within three years from the date the state court judgment and sentence became final under state law, or the date on which appellate review of such judgement and sentence has been concluded." This change is necessary because some states' criminal judgments become final after entry at the trial level yet it was the intention not to begin the running of the three-year statute of limitation until the direct appeal was concluded. Thus, this new language ensures that there will be no doubt that the period of limitation begins to run after a direct appeal, if any.

In Section 3, paragraph (d)(6), line 25, strike "on a consideration of such part of the record as a whole concludes that there is no evidence to support such finding" and insert therein "viewing the record in the light most favorable to the prosecution concludes that a rational trier of fact could not have made such finding." This change is to avoid any tension with the United States Supreme Court holding in Jackson v. Virginia, 433 U.S. 307 (1979). This change specifically incorporates and codifies the standard of review of factual determinations of state courts in criminal cases as required by this decision.

I'm sure the subcommittee will hear from opponents of this legislation that the writ of habeas corpus is a fundamental right, unique to the legal system of a free people, which should not be tampered with under any circumstances.

I would suggest to them that the writ has already been tampered with, and by these amendments we seek to restore it. As Justice Jackson said, those who sanction abuse of the writ are its real enemies.

Thank you.

STATEMENT

OF

GOVERNOR BOB GRAHAM

GOVERNOR OF FLORIDA

on behalf of the

THE NATIONAL GOVERNORS' ASSOCIATION

Mr. Chairman, on behalf of the State of Florida and the National Governor's Association, I appreciate the opportunity to present these remarks concerning the reform of habeas corpus procedures relating to federal court review of state criminal convictions.

The Criminal Justice System, at both the state and federal levels, is continually criticized for its lack of speedy administration of justice and its seeming inability to control crime and protect our citizens. Most of us agree with the experts who tell us the greatest single deterrent to crime is swift and sure punishment for guilty offenders; yet the system too often fails to deliver a final judgment.

The citizens of Florida are greatly concerned about the problem of crime--especially violent crime--in our cities. Our shores have been inundated with foreigners entering the United States illegally and massive quantities of illegal narcotics. Both of these problems, while having far-reaching effects at the national level, have had a major impact on South Florida.

Crime, and the fear of crime, has caused many of our citizens, especially the elderly, to alter their life-styles. People feel that they are no longer safe in their own neighborhoods and exist as virtual prisoners in their homes. We must be careful, however, to balance the rights of criminal defendants with those of the victims and society.

We must not let our system of justice become so over-burdened with these protections that there is no finality in the judgments of our courts with the result that public confidence in our Criminal Justice System becomes eroded.

For example, in the two years and ten months that I have been Governor of Florida, I have signed 22 death warrants and 13 have expired during federal stays granted on petitions for a writ of habeas corpus. In the one case in which the law of Florida was carried out, it took 17 judicial reviews, including four by the Florida Supreme Court and six by the U.S. Supreme Court. I submit that it is unreasonable to expect that our Criminal Justice System must take seven years to determine the fairness of a two or three week trial.

The Attorney General of Florida, Jim Smith, has been a major proponent of changing the federal criminal code as it relates to habeas corpus appeals. As Florida's chief legal officer, he is responsible for representing our State in these numerous, time-consuming and expensive appeals and will testify as to the compelling need for this reform.

The Attorney General's Task Force on Violent Crime, after numerous public hearings throughout the United States, has recommended in its final report dated August 17, 1981 that habeas corpus reform, such as that under consideration here today, be adopted.

Additionally, the National Governor's Association, at its annual meeting in Atlantic City, New Jersey, on August 9 - 11, 1981 unanimously adopted a resolution supporting this legislation under consideration today and I am pleased to present it at this time.
(resolution attached)

While I am a strong believer in procedural gains made by criminal defendants in protecting their rights to a fair trial, such as the right to counsel and the right to remain silent when questioned by law enforcement officials, I believe that the Federal Writ of Habeas Corpus, as presently utilized, has become a device to frustrate and unduly delay the administration of justice.

The reform of Federal Habeas Corpus proceedings will ensure a greater finality of state criminal court convictions and a greater deference to findings of fact in state criminal proceedings. The proposals before you are not designed to prevent reasonable review of state criminal convictions by federal courts, but are intended to prevent the filing of frivolous and repetitious petitions for habeas corpus.

I urge your wholehearted support of Senate Bill 653.

Thank you.

NATIONAL GOVERNORS' ASSOCIATION

1. COMMITTEE ON CRIMINAL JUSTICE AND PUBLIC PROTECTION SUSPENSION FEDERAL CRIMINAL LAW/HABEAS CORPUS PROCEEDINGS

The problem of crime in our cities and states is increasingly serious. While crime rates continue to rise, public confidence in the criminal justice system shows a corresponding decline.

The National Governors' Association believes that one of the principal factors contributing to this decline in public confidence is the existing lack of certainty and finality in the criminal justice system. Although certainty and swiftness of justice have been universally accepted as a strong deterrent to criminal activity, the diminishing ability of the states to carry out the judgments of their criminal courts has led to an erosion of certainty.

We further believe that the Writ of Habeas Corpus was designed as a shield to protect innocent citizens and not as a sword to frustrate the administration of justice. Today, however, some of those commendable procedural safeguards attached to the writ are being abused and have become instruments with which to delay or stymie justice.

Because of these and other problems caused by the abuse of the Writ of Habeas Corpus, amendments to federal criminal law are necessary to require the orderly and timely presentation of claims on behalf of criminal defendants and to restore finality to the criminal justice process and a proper respect for state court factual determinations. The amendments should:

- Require that a district judge, rather than a magistrate, conduct any evidentiary hearing held in a habeas corpus proceeding involving a prisoner held in state custody.
- Recognize the legitimacy of the "contemporaneous objection rule" which bars litigation of issues not properly raised unless "cause and prejudice" is shown for failing to comply with state procedural requirements. Requiring that issues must be raised in the state court system if they are to be raised in the federal system, absent special circumstance, is the only fair and sensible approach to administering criminal justice. It gives the state system an opportunity to correct any constitutional error and to resolve any factual disputes while the witnesses still have keen memories, and protects defendants by ensuring that their rights are promptly vindicated at trial or on direct appeal and not after many years of incarceration.
- Establish a reasonable time limit within which state prisoners must institute a federal habeas corpus action which challenges their state court conviction.
- Require a habeas corpus court to accept state court findings of fact where there is an evidentiary basis for that finding providing the petitioner was accorded a full and fair hearing on the factual issue.

DEPARTMENT OF LEGAL AFFAIRS
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FLORIDA 32301

JIM SMITH
Attorney General
State of Florida

December 2, 1981

Ms. Linda White
Chief Clerk
Senate Judiciary Committee
Subcommittee on Courts
2233 Dirksen Office Building
Washington, D.C. 20510

Re: S. 653, Habeas Corpus Procedures Amendments Act of 1981

Dear Ms. White:

In accordance with my testimony given on November 13, 1981, before the Subcommittee on Courts, Committee on the Judiciary, I wish to supplement the record with the following information consisting of an order of a Florida District Court Judge, supplemental responses to questions asked of me during my testimony, and commentary on the testimony of other witnesses.

Attached is a copy of relevant portions of an opinion rendered by United States District Judge Hodges, Middle District of Florida, on May 8, 1981, referred to in my testimony. In this order the court clearly placed the responsibility for creating federal review of state criminal convictions on Congress and noted that Congress is the proper institution of government to cure imperfections in use of the writ.

During my testimony, Mr. Velde requested the percentage of Florida's inmates filing federal writs of habeas corpus. According to the 1980 Annual Report, Administrative Office of the United States Courts, at A-151 and A-152, in the twelve-month period ending June 30, 1980, federal magistrates handled 491 state prisoner petitions for habeas corpus in Florida. During this period, Florida had some 20,000 inmates. Thus some 2.5 percent of all inmates filed a federal habeas corpus petition during that twelve-month period.

Regarding the Testimony of Jonathan C. Rose
Assistant Attorney General
Department of Justice

Concerning the statement of Jonathan C. Rose, I wish to again reiterate my opposition to his suggestion that an exception be made to the three-year statute of limitation. He suggests Congress add language to S. 653 to allow a court in its discretion to entertain a petition for habeas corpus after the limitation period expired when "necessary to avoid injustice." I believe that such a standard would effectively eliminate the period of limitation. Every petitioner would claim "injustice" forcing the courts to litigate this issue and no doubt out of an abundance of caution would elect to hear the petitioner's claim. Such a standard offers no real relief to the states. However, should Congress believe the three-year period of limitation too inflexible then I endorse the suggestion of Senator Heflin that an exception be created to allow a federal court to hear a case to avoid an "extreme injustice" only if a state does not have a system or procedure for allowing collateral attacks on criminal convictions and if the allegation of "extreme injustice" related to the petitioner's guilt or innocence. If a state had a procedure for collateral review then no such exception to the period of limitation would be available. The petitioner would have to pursue his remedy in state court if beyond the three-year period of limitation.

Mr. Rose recommends Section 3 of S. 653 also apply to determination by state courts of issues of law as well as fact. This suggestion is clearly appropriate and should be considered by the Congress. This is particularly true in light of such decisions as Jurek v. Estelle, 623 F.2d 929 (5th Cir. 1980) and Baty v. Balkcom, ____ F.2d ____ (11th Cir. 1981), Case No. 80-7668, Opinion filed November 16, 1981. I look forward to receiving his specific proposal.

Regarding the Testimony of Richard J. Wilson
Director, Defender Division
National Legal Aid and Defender Association

Mr. Wilson in his opening comments to the Subcommittee stated that habeas corpus filings by state prisoners "have declined acutely over the last decade" and that habeas proceedings do not adversely impact the administration of justice. This is not the case. In Fay v. Noia, 372 U.S. 391 (1963), Justice Clark observed that from 1941 through 1962 the number of habeas corpus petitions rose from 127 to 1,232. Fay v. Noia, supra, at p. 446, note 2. According to the 1980 Annual Report published by the Administrative Office of the United States Courts, habeas corpus petitions filed by state prisoners in the United States District Courts between 1975 and 1980 were as follows:

1975------------7,843
1976------------7,833
1977------------6,866
1978------------7,033
1979------------7,123
1980------------7,031
1981------------7,790
(Annual Report at p. 62, and written testimony of Richard J. Wilson at p. 6 as to year 1981).

That agency itself stated that state prisoner petitions represented a "significant" portion of civil litigation of the district courts. (Id., p. 60). The foregoing table for years 1975-81 clearly demonstrates there has been no overall decline in petitions in recent years.

The complaint by Mr. Wilson that state post-conviction remedies are futile ignores the fact that errors should be raised at the original trial and on direct appeal by counsel which is why counsel is provided in the first instance. Witt v. State, 387 So.2d 922 (Fla. 1980). Collateral proceedings are not a substitute for direct appeal which is what most petitioners attempt to do.

According to Mr. Wilson, the amendments in S. 653 "would result in totally arbitrary exclusion of certain state court defendants from the federal habeas process." Mr. Wilson alleges that these defendants could not push their cases through the state court direct and collateral appeals process within three years and therefore would be forever barred from relief in federal court despite a showing of merit to their claims.

Initially, if there were a showing of merit to their claims, then presumably state courts would agree and correct the judgments without need of federal review. Contrary to the belief of Mr. Wilson, state courts do adequately protect defendants' constitutional rights.

Secondly, defendants would not be "forever barred" from relief in federal court because they could petition for certiorari in the United States Supreme Court. Thus, defendants can seek relief in the United States Supreme Court on petition for certiorari if state courts trample their federal constitutional rights. Indeed, in most habeas corpus cases in Florida, defendants have already unsuccessfully sought federal review in the Supreme Court by certiorari. Under such circumstances, it is obvious judicial resources are being squandered.

Thirdly, and most importantly, the period of limitation in S. 653 does not begin to run until the state court judgment is final under state law. In most if not all states this occurs after the completion of the direct appeal or appeals or direct review. Thus, in most states finality is not achieved until the state supreme court renders its opinion and this opinion has become final. As a practical matter, this means for most states a period of one to three years after the original conviction in trial court, upon which the three-year limitation period of S. 653 is added. This procedure affords ample time to seek federal review. Accordingly, the cases cited by Mr. Wilson on page 12 of his written remarks would not be barred under S. 653. Should there be any doubt whether some states' criminal judgments become final after entry at the trial court level even though appealed to state appellate courts, Congress should specifically insert the following words on page 3, line 11, of S. 653 after "under state law": "or the date on which appellate review of such judgment and sentence has been concluded." This is the approach utilized in the companion House version of S. 653, H.R. 3416.

It should also be noted that even though a state conviction may have become final yet there remains a collateral proceeding in state court there is nothing to prevent the defendant from pursuing his habeas corpus petition in federal court during the pendency of the collateral proceeding. The federal court obviously would not apply exhaustion of state remedies under such circumstances since to do so would eliminate the defendant's right to seek federal habeas corpus relief. Thus, in all events, a defendant is not "boxed in" by the three-year statute of limitation. He has ample time for filing his federal constitutional claim in federal court after the state judgment becomes final.

Mr. Wilson's complaint about Section 3 of S. 653 reflects a total misunderstanding of Townsend v. Sain, 372 U.S. 293 (1963) and Brown v. Allen, 344 U.S. 443 (1953). The amendment merely recognizes that if there was a "full and fair hearing" in the state court a second evidentiary hearing is unnecessary. If there is competent evidence to support the state court hearing why should a federal district court be permitted to hold another hearing. See Justice Stevens' dissenting opinion in Jackson v. Virginia, 443 U.S. 307 (1979).

Throughout the remarks of Mr. Wilson is the premise that state courts do not adequately protect federal rights of criminal defendants. This was rejected by the Supreme Court of the United States in Stone v. Powell, 482 U.S. 465 (1976) as being unsupported by the cases coming before that Court. Congress should likewise reject Mr. Wilson's view. State judges are selected from the same pool of talent as federal judges and state judges are also sworn to uphold the federal constitution They can be trusted to protect our civil liberties.

Moreover, if as Mr. Wilson asserts state judges are not competent to protect defendants' constitutional rights, then prosecution and adjudication of defendants should simply be turned over to the federal government. A system of justice in which state court proceedings are only a preliminary step with ultimate decisions on the facts and the law routinely occurring in federal court is certainly less preferable. There simply is no reason to have a state court system if Mr. Wilson's views prevail.

Regarding the Testimony of Robert L. Harris Past President, National Bar Association

Mr. Harris testified that under S. 653 defendants could not raise ineffective assistance of counsel in habeas corpus cases. This assertion is incorrect. Ineffective assistance of counsel can be raised by habeas corpus petition even with adoption of S. 653 just as any other federal constitutional claim can be raised. S. 653 simply requires that these claims be raised in an orderly and timely manner with proper respect for state court factual determinations and that the state court system first be allowed to rule on the claim.

Mr. Harris may be referring to the fact that ineffective assistance of counsel not arising to a Sixth Amendment violation cannot be raised as cause for failing to comply with legitimate state court procedures. This concerns Section 2 of S. 653 which bars federal constitutional claims not presented in state court unless the petitioner establishes that the alleged violation of the federal right was prejudicial to guilt or punishment and that one of four other criteria were met. Apparently, Mr. Harris as well as Mr. Wilson believe that one of these criteria should also be that ineffective assistance of counsel resulted in the failure to raise the federal claim in state court.

To create such an exception to Section 2 of S. 653 would in my opinion completely undermine the principle contained in this amendment as well as undercut the Supreme Court's decision in Wainwright v. Sykes, 433 U.S. 72 (1977). Moreover, this suggestion has already been rejected by several of the circuits. In Lumpkin v. Ricketts, 551 F.2d 680 (5th Cir. 1977), the court was determining whether petitioner had demonstrated cause for failing to make a timely challenge in state court. The court noted that "the only allegation in this regard is that his trial attorney provided ineffective assistance of counsel in failing to object." The court rejected this assertion as an excuse for failing to comply with state court procedures noting that it would effectively eliminate the rule:

> This assertion must be rejected, however, for, if accepted, it would effectively eliminate any requirement of showing cause at all. If a petitioner could not demonstrate any legitimate cause, he would only have to raise the specter of ineffective assistance of counsel to get his challenge heard. This we refuse to sanction.
> 551 F.2d 683.

To like effect is Indiviglio v. United States, 612 F.2d 624 (2nd Cir. 1979), cert. denied, 100 S.Ct. 1326 (1980):

> Without some showing that counsel's mistakes were so egregious as to amount to a Sixth Amendment violation [of ineffective assistance of counsel], a mere allegation of error by counsel is insufficient to establish 'cause' to excuse a procedural default.
> 612 F.2d 631.

Accord, Washington v. Estelle, 648 F.2d 276 (5th Cir. 1981).

Congress should reject this suggestion just as the Fifth and Second Circuits have done.

Finally, Mr. Harris testified that the case of Walker v. Wainwright, a Florida case cited by myself in my testimony, proves his point that habeas corpus relief should always be available to a criminal defendant. I wish to simply explain the facts of this case which I believe clearly demonstrate the need for a period of limitation within which habeas petitions must be brought.

In 1937 Walker raped a female child under the age of ten years and was apprehended in the act by a number of citizens. Through counsel Walker entered a guilty plea on April 15, 1937 and was sentenced to life imprisonment.

In August of 1968 after his parole was revoked and he was reincarcerated Walker filed a petition for writ of habeas corpus in federal court alleging that he was not provided with an attorney to represent him in the original conviction and that he was coerced into pleading guilty by the arresting officer who happened to be the sheriff of the county wherein the crime was committed.

An evidentiary hearing was ordered even though the records showed Walker did have an attorney at the time he entered the plea and the claim was presented some thirty years after the entry of the plea.

Fortunately the state located the sheriff, who had retired and was still living in the area. He was the only living witness other than Walker since both the defense lawyer and trial judge had died years earlier. At the hearing the sheriff denied threatening Walker in any way whatsoever and testified the charge was absurd because the state had numerous witnesses who caught Walker raping the child. The district judge on February 13, 1970, denied the writ of habeas corpus finding Walker was not credible. In August of 1970 the United States Court of Appeals, Fifth Circuit, affirmed the order denying relief, Walker v. Wainwright, 430 F.2d 936 (1970).

One year later Walker filed a second petition for writ of habeas corpus in federal district court and this time alleged his attorney was ineffective. The state objected to issuance of the writ raising laches as an affirmative defense because trial counsel had died and without his testimony the state could not refute the defendant's testimony. The district judge held a second evidentiary hearing and on the basis of Walker's uncontradicted testimony granted the writ of habeas corpus. The court presumed that Walker was prejudiced by counsel pleading him guilty shortly after being appointed to represent him.

What the state could not prove due to the death of key witnesses including trial counsel was that the trial judge had a personal opposition to the death penalty and by pleading guilty counsel for Walker avoided the possibility of having a jury return a death sentence. Thus, counsel for Walker could have been shown by the state to have been effective had the petition been more timely filed. The statute of limitation would bar such stale claims which are virtually impossible for the state to refute. Walker prevailed in this case not because his claim was meritorious but because the state could not refute his testimony due to the passage of time--here some 34 years. A statute of limitation to prevent such unjust results is imperative.

Thank you for including these remarks in the record of the hearing. Please call on me if you need additional information.

Sincerely,

Attorney General

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WILLIE JASPER DARDEN,
Petitioner,

-vs-   CASE NO. 79-566 Civ-T-H

LOUIE L. WAINWRIGHT, Secretary
of Department of Offender
Rehabilitation, State of
Florida,
Respondent.

MEMORANDUM OPINION

Willie Jasper Darden, a Florida prisoner under sentence of death, petitions for a writ of habeas corpus pursuant to 28 USC §2254. His petition was referred to a United States Magistrate who conducted an evidentiary hearing and subsequently rendered a Report and Recommendation that relief be granted on two grounds. The parties filed their respective objections to the Magistrate's Report, and a hearing was then conducted before me in order to facilitate the de novo determination required by 28 USC §636(b)(1)(B) and (C). See also, Rule 6.02, M. D. Fla. Rules, and Rule 8(b)(4), Rules Governing §2254 Cases. Upon full consideration of the Magistrate's Report, the record of the proceedings he conducted, and the case in general, I am convinced that the infirmities in the Petitioner's trial do not assume constitutional dimensions and that his petition should be denied.

I Background

Carl's Furniture Store was located in Lakeland, Florida. It was a small retail store dealing in used furniture and household appliances. The business was owned by Mrs. Helen Turman and her husband Carl. Their home was adjacent to the store, and Mrs. Turman managed the business alone while Mr. Turman held employment elsewhere.

On the evening of September 8, 1973, Mrs. Turman was the victim of an armed robbery in her store. While that crime was in progress Mr. Turman happened to enter upon the scene. He was followed a few minutes later by Phillip Arnold, a teenaged neighbor. What happened next was succinctly described by the Supreme Court of Florida in the following terms:*

> The record shows that Appellant first robbed Mrs. Helen Turman and that, when her unarmed husband Carl started to enter the store, Appellant shot him between the eyes scattering blood and brains. As a sixteen year old boy, Phillip Arnold, tried to aid the wounded man, Appellant shot him in his mouth, neck, and side, leaving permanent injuries, including a bullet still in his neck at time of trial. While her bleeding husband lay in a rainstorm at the door, Appellant tried to force Mrs. Turman to commit an unnatural sex act upon him at gun point. She refused, and after shooting the boy Appellant left the area.

Darden was arrested and subsequently indicted for first degree murder (of Mr. Turman), robbery (of Mrs. Turman), and assault with intent to commit murder (upon Phillip Arnold). Following a change of venue to another county, the trial was held in January, 1974. In addition to circumstantial evidence against him, Darden was positively identified during the trial by Mrs. Turman and Phillip Arnold. His defense was alibi, and he was the sole witness to testify in his behalf.**

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* Darden v. State, 329 So.2d 287, 290 (Fla. 1976). The Magistrate's Report and Recommendation contains a more detailed description of the facts.

**The Petitioner thus gained a procedural advantage afforded by the Florida Rule that ". . . a defendant offering no testimony in his own behalf, except his own, shall be entitled to the concluding argument before the jury." Rule 3.250, Fla. Rules of Criminal Procedure, 34 F.S.A. 5 (1975).

IV Conclusion

The Petitioner's trial was not perfect, but neither was it fundamentally unfair. His jury was properly examined on voir dire and none was excused merely because of expressed opposition to capital punishment. His other claims of constitutional deprivation were determined by the Magistrate to be unfounded, and in that the Magistrate was correct.

The petition for a writ of habeas corpus pursuant to 28 USC §2254 is DENIED, and the stay of the warrant is DISSOLVED. The Clerk is directed to enter final judgment.

V Epilogue

The Turman murder occurred in 1973. Darden was quickly apprehended, and was promptly tried, convicted and sentenced within a year. His direct appeal was decided by the Supreme Court of Florida in 1976, and the following year the Supreme Court of the United States discharged a writ of certiorari previously granted. Clemency proceedings occupied the next two years, and the Governor ultimately signed a death warrant in May, 1979. Petitioner then filed the instant petition in this Court, pursuant to 28 USC §2254, almost six years after the offense.

The nature of the case, and others like it, has attracted intensive publicity which has, in turn, served to fuel a growing public frustration concerning the administration of criminal justice in the courts. The Chief Justice of the United States in his last annual address to the American Bar Association recognized and gave voice to the same public frustration; and, to the extent that this very real exasperation is fomenting an overall loss of confidence on the part of the public in its court system, particularly the federal courts, those who supply the public with information and opinion should be particularly careful to impart only that information which is accurate in every detail. Unfortunately, many lay persons and even some lawyers and judges do not seem to understand the historical or the contemporary role of the federal courts in habeas corpus proceedings involving state prisoners, and that lack of understanding has caused the public to be the recipient of a considerable quantity of misinformation and erroneous innuendo concerning the proper institution of government upon which responsibility should be placed for both the condition and the cure.

The Constitution of the United States, Article I, Section 9, Clause 2, the so-called non-suspension clause, provides as follows:

> "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

Many seem to believe that this constitutional provision is the direct jurisdictional base of habeas corpus proceedings involving state prisoners. That conclusion is open to substantial doubt. Until 1867, or during the first seventy-eight years of constitutional government, the writ of habeas corpus in the federal courts was governed by the Judiciary Act of 1789 and extended only to prisoners held in custody by the United States, not the several states. Furthermore, even with respect to federal prisoners, the scope or power of the writ was limited to an inquiry as to the jurisdiction of the sentencing tribunal.

In 1867 the availability of the writ of habeas corpus in the federal courts was extended to state prisoners by act of congress now embodied in 28 USC §2254. Even then, however, the early cases limited the reach of the writ to an examination of "ext. injunction"

"necessary to avoid injunction"

the jurisdiction of the sentencing court. See Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037 (1976). See also Schneckloth v. Bustamonte, 412 U.S. 218, 250, 93 S.Ct. 2041, 2059 (1973) (Powell, J., concurring), and Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977).

Recently, in Swain v. Pressley, 430 U.S. 372, 94 S.Ct. 1224 (1977), dealing with the statute creating the Superior Court of the District of Columbia, the Court's decision suggests that the District Courts might well be relieved, with constitutional impunity, of any jurisdiction to issue writs of habeas corpus at the behest of state prisoners so long as state law affords an adequate and effective collateral remedy to test the legality of the petitioner's detention.

In any event, whether the constitution has etched the writ in stone to any degree or not at all is not the point here. It is enough that the existing statutes, 28 USC §§ 2241 and 2254, afford the remedy and thus require the District Courts to entertain a state prisoner's application for a writ of habeas corpus if it is claimed that he is detained in custody in violation of the Constitution or laws or treaties of the United States. Moreover, the fact that the state courts have heard and adjudicated the constitutional claim does not generally* preclude the authority and duty of the District Court to make an independent determination of the constitutional issue. Indeed, as a matter of comity to the state courts, the statute requires that all existing state remedies be exhausted before the petition is filed in the federal court so that, of necessity, the habeas proceeding is always a re-hashing of the constitutional issues already decided in the state courts.

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*Stone v. Powell, supra, dealing with Fourth Amendment issues, constitutes an exception.

The point of this discussion is that, while there is great clamor for statutory redress of our present law concerning habeas corpus relief, all involved should remember (or should be clearly informed, as the case might be) that the existing law ~~is~~ itself of statutory origin. It was not created, and cannot be amended, by the courts. Given the statute it would be a gross violation of law and of a judge's oath of office if he should arbitrarily decline to entertain a proper petition filed under it; and to the extent there is widespread belief that the federal courts have somehow "bootstrapped" their own authority to indiscriminately meddle in state court criminal prosecutions - - a belief nurtured by inferences to that effect in the public press - - unjustified and unnecessary damage is being done to the very system of judicial administration in which all of us are so vitally interested. Those who wish to debate the need for change should focus their attention and the brunt of their remarks upon the statute and the Congress, not the Courts.

In addition to substantive issues, there is also public concern about the length of time taken by the courts in disposing of habeas corpus proceedings. Quite apart from the notoriously crowded dockets of the federal courts, however, a circumstance which is also beyond the control of the courts, there is no provision in 28 USC §2254 requiring expedited consideration whereas there are at least two dozen other statutes which do require that preference be given to specified classes of cases such as, for example, criminal cases governed by the Speedy Trial Act, 18 USC §3161.*

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*A habeas corpus proceeding under 22 USC §2254 is a civil case in the federal court. Examples of other statutes requiring expedited consideration of certain civil cases are 42 USC §2000e-5(f)(5), Equal Employment Opportunity Act; 42 USC §1971(g), Voting Rights Act; 29 USC §1303(e)(4), Employee Retirement Income Security Act; 42 USC §504(e), Social Security Act.

Whatever the future may hold for habeas corpus proceedings instituted by state prisoners generally, and whatever the public perspective may be, the case of Willie Jasper Darden has been thoroughly, thoughtfully and quietly considered under the statute and the Constitution, and judgment will now be entered as directed. The Petitioner may then seek timely review by the Court of Appeals, as is his right.

IT IS SO ORDERED at Tampa, Florida, this 8th day of May, 1981.

UNITED STATES DISTRICT JUDGE

DEPARTMENT OF LEGAL AFFAIRS
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FLORIDA 32301

JIM SMITH
Attorney General
State of Florida

December 18, 1981

Ms. Linda White
Chief Clerk
Senate Judiciary Committee
Subcommittee on Courts
2233 Dirksen Office Building
Washington, D.C. 20510

Re: S. 653, Habeas Corpus Procedures Amendment Act of 1981

Dear Ms. White:

I wish to supplement the record before the Subcommittee on Courts, Committee on the Judiciary, concerning the above-described bill with the following information consisting of a recent order issued by a United States District Judge in Florida concerning federal review of state criminal convictions by virtue of the Habeas Corpus Act.

In this case, the defendant was convicted of murder but waited a number of years before bringing his habeas corpus petition. Particular attention is drawn to page 13 wherein the judge comments on S. 653 which would create a time limitation within which writs of habeas corpus could be instituted:

> There are certain matters that the public might wonder about, and I understand why they might. For example, why a case that was tried in December of 1975 didn't get reviewed on this basis until December of 1981. I don't know why the Supreme Court of Florida took three-and-a-half years. I don't know why it took another couple of years for the death warrant to be issued. And I don't know why the Congress of the United States doesn't enact the law that has been introduced setting forth a time limitation within which these writs of habeas corpus must be instituted. If they had, we wouldn't be here on a crash basis. (e.s.)

The opinion is attached for your information.

Sincerely,

Attorney General

JS/tlv

Enclosure

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 81-6663-Civ-NCR

ALVIN BERNARD FORD

Petitioner

-vs.-

CHARES G. STRICKLAND,
JR., etc., et al

Respondents

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

'81 [illegible] 10

The facts are presented in terse form in the opinion of the Supreme Court of the State of Florida, as follows:

> On the morning of July 21, 1974, Ford and three others, who had decided to commit a robbery, went with weapons to a Red Lobster Restaurant in Fort Lauderdale, Florida. During the robbery, after two people had escaped from the restaurant, Ford's three accomplices realized the police would soon arrive and so left the scene of the crime. Ford remained in order to effectuate the theft of some $7,000 from the restaurant's vault and was confronted by Officer Dimitri Walter Ilyankoff of the Fort Lauderdale Police Department. Ford shot the policeman three times, wounding him fatally. Appellant escaped in the decedent's police car, and his fingerprints were later found in the vehicle after it had been abandoned. He was arrested in the vicinity of Gainesville, Florida, and was returned to Fort Lauderdale for indictment and trial.

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WEST PALM BEACH
FLORIDA

Ford v. State, 374 So. 2d 496, 497 (Fla. 1979).

The Supreme Court of Florida did not go into much detail and, as stated in the Supreme Court's opinion, the circumstances of the killing are somewhat less than explicit. What happened was that Ilyankoff arrived on the scene and was shot twice in the abdomen without warning. While lying outside the back door of the Red Lobster Restaurant, defendant Ford then ran out of the restaurant to the police cruiser, apparently realizing that his accomplices had left in the escape vehicle without him. There were no keys in the cruiser so Ford returned to the police officer. Ilyankoff had, in the meantime, radioed for assistance and had struggled in an effort to get up. Defendant ran back to the police officer and asked him for his keys. Ilyankoff then was shot in the back of the head, at close range by defendant Ford; at that point Ford took the keys and escaped in the police cruiser at high speed. Not only was there an eye witness, an employee of the restaurant cowering in a utility room at the back of the restaurant observing it all through a slatted door only about five feet from the officer, but Ford's movements were seen by a nearby resident and the call for help was, of course, heard on the radio as well as taped. It seems unnecessary to go into more elaborate details about the slaying or the corroborating evidence for purposes of this order.

FINDINGS AND CONCLUSIONS

Defendant is present, counsel are present.

I am going to take the issues as they were raised in the petition for writ of habeas corpus filed by the defendant below and petitioner in this court, in the case of Alvin Bernard Ford versus Charges G. Strickland, et al., 81-6663-Civ-NCR.

The first issue raised was the issue of confrontation of witnesses. The ground asserted is that the petitioner was denied the right to confront witnesses, and the court finds no merit in that contention, for a number of reasons.

The opportunity existed for the defendant to call Ms. Buchanan in this case as a witness. Whether or not defense counsel would have been successful in treating Ms. Buchanan as an adverse witness, of course, is problematical, and I shall not indulge in speculation as to that ruling, nor do I find it would rise to the constitutional level required for the issuance of the writ, even if the state trial court's ruling was wrong. Besides, the matter has been treated additionally by the Supreme Court of Florida in its holding.

I emphasize again this court does not sit as an appellate tribunal to review the findings of the Supreme Court of Florida or to second-guess the trial court judge, but only in the area prescribed by the Congress under 28 U.S.C. § 2254.

As to the alleged issue of the non-disclosure of exculpatory evidence, I can't find in this record that the defendant has carried the burden in the slightest on this point.

I might add Ms. Buchanan was found by the Supreme Court of Florida to be impeached. Ford v. State, 374 So. 2d 496, 499 (Fla. 1979). That applies, I think, not only to issue A but certainly has some bearing on issue B. But there's been a total failure on the part of the defendant to carry this point, issue B.

Issue C is the claimed denial of the right to assistance of counsel in connection with the Miranda warnings.

In the first place, it was not a statement as to doing the shooting in connection with the robbery but only as to the robbery. There was such an overwhelming amount of evidence establishing the complicity of the defendant in the robbery at the Red Lobster that it would have been harmless error by any standard. Additionally, Wainwright v. Sykes, 433 U.S. 72 (1977) applies.

The allegation of ineffective assistance of counsel isn't cause under Lumpkin v. Ricketts, 551 F.2d 680, 682-83 (5th Cir. 1977). This court does not find a showing of ineffective counsel on this point. Mr. Adams raised it in the motion to suppress and he lost the ruling.

Neither does the court find that Edwards v. Arizona, 101 S. Ct. 1880 (1981), should be applied retroactively. Miranda wasn't and there seems no reason to do so from its progeny. Miranda v. Arizona, 384 U.S. 436 (1966). No persuasion has been presented that such should be the case, and the court rejects that argument. That point is without merit.

Issue D relates to the claim of a Witherspoon violation. Witherspoon v. Illinois, 391 U.S. 510 (1968). Judge Lee went over this matter more than once with the jury. To be sure, it probably would have been better if he had conducted inquiries with each juror individually. As counsel suggested at the hearing Saturday, we probably wouldn't even have the issue before us had he done so. Perhaps with hindsight he would have done it differently.

It will be six years on Wednesday since this trial commenced and the jury was selected; I think that ought to be considered by all courts at this stage in evaluating what happened then. Was what the trial judge did during the voire dire such error as to require the issuance of the writ? This court doesn't find so. The court finds that Witherspoon was substantially complied with. Again, Wainwright v. Sykes, 433 U.S. 72 (1977), applies and the court does not find ineffective assistance of counsel in that regard.

In the sentencing phase instructions to the jury, here again Wainwright v. Sykes controls. The court does not find ineffective assistance of defendant's counsel in this matter.

Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), was decided in September, just prior to the split of the circuits with a very vigorous -- vehement, I should say -- dissent by Judge Coleman. Id. at 1378. However, petition for rehearing en banc was denied four days ago. Whether or not that was influenced by the split of the circuits is a matter of no relevance to this court.

At first blush it would appear that the instruction given in Washington v. Watkins was in the same format as that given in this case. Id. at 1367-68. I frankly am somewhat puzzled by the majority decision in Washington v. Watkins, but they decided and I accept it. However, I think there is a valid distinction: Mississippi has sentencing by a jury, or at least a jury makes a binding sentence recommendation; Florida does not. Florida has sentencing of death by a judge and the jury's verdict is only advisory.

The Eleventh Circuit in Henry v. Wainwright, No. 80-5184 (11th Cir. Nov. 12, 1981), supports the court's conclusion in this regard. Henry does not fit this case on the merits because at the Henry trial there was sanctioning of this jury's consideration not only of the statutory aggravating factors but anything else the jury determined to be aggravating. Id. slip op. at 12914-15. That was not the situation in the instant trial at all.

It is significant that in Henry v. Wainwright, Judge Reed in the Middle District, granted the writ if the state trial court failed to provide a second sentencing within 90 days of the court's order. Id. slip op. at 12913. The Eleventh Circuit affirmed the judgment of the District Court.

Let's look at the record in the instant case because it applies to that. For example, Judge Lee concluded in 1975 that: "There are sufficient and great aggravating circumstances which exist to justify the sentence of death. Indeed, it is difficult to imagine a crime which is more heinous, atrocious and cruel and under our existing law it is deserving of no sentence but death." Ford v. State, 374 So. 2d 496, 502 n.1 (Fla. 1979).

Less than two weeks ago, November 25, 1981, at the hearing on motion for post-conviction relief, after the rendering of these opinions, Judge Lee stated at page 249 of that hearing transcript:

> I am satisfied on the presentation here today that the evidence was overwhelming of Mr. Ford's guilt, that he was guilty then and he remains guilty now, and that the imposition of the death sentence was then and is now a proper one to have imposed, and indeed the facts of the case allowed for none other.

Even if the court assumed that Washington v. Watkins compelled the issuance of the writ; the authority of Henry would indicate granting the writ if the state trial court failed to provide a second sentencing hearing within ninety days. Such an order would, in view of Judge Lee's comments only twelve days ago, be a straining of federalism to an extreme degree. Frankly, it would almost be an insult to Judge Lee. Judge Lee certainly deserves no such insult. Just as equity does not require a vain act to be done, I see nothing in view of these circumstances that would dictate that such a vain procedure be required of Judge Lee. Consequently, the court finds no merit in issue E.

Issue F claims an unconstitutional shifting of the burden at the penalty phase of the trial.

I must say petitioner must not have thought much of this point; he only gave seven-and-a-half lines to it in the petition. I don't think much of it, either. I think Proffitt v. Florida, 428 U.S. 242 (1976) is sufficient itself to reject the claim.

Issue G is a claim that the Florida Supreme Court failed to set aside the death sentence despite the substantial erosion of the basis for the death sentence. Here again, I can't find that the Supreme Court of Florida ignored, or that the sentencer ignored, non-statutory mitigating factors. Even though some of the aggravating factors were set aside by the Supreme Court of Florida in its opinion, still the determination of that matter on aggravating/mitigating factors, was rejected by the Supreme Court of the United States in Proffitt v. Florida, 428 U.S. at 255.

That will also apply to issue H, the alleged failure of the Supreme Court of Florida to assure imposition of the death penalty fairly and consistently. All defendant is doing here is quarreling with the Florida Supreme Court; that doesn't rise to a constitutional basis. It is rejected on the basis not only of Proffitt, but also the Fifth Circuit case of Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), where the court referred to the Supreme Court of Georgia stating that "The Supreme Court of Georgia is the ultimate authority on the law of Georgia and we are not permitted to question its interpretation of that State's statutes. We must therefore treat [aggravating] circumstance (2) as it is interpreted by the Georgia Supreme Court." Id. at 405-06 (citations omitted). So must this court as to the Florida Supreme Court.

Issue I, the alleged Florida Supreme Court practice of reviewing psychiatric material or other material with reference to the defendant without the defendant or the defendant's attorney being aware of it.

One, this is nothing but speculation that such occurred in the defendant's file. There's been no evidence presented and admittedly by defendant none could be. There were no letters of transmittal or anything at all to suggest that such material existed in the petitioner's file -- only that it existed in other files. Therefore defendant asked this court to speculate that the Supreme Court of Florida had done similarly in petitioner's case, as well. Well, it clearly is without merit.

Additionally, defendant was one of a class of plaintiffs who sued the Supreme Court on this. They lost and certiorari was denied by the United States Supreme Court on November 2, 1981. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), cert. denied, No. 80-6434 (Nov. 2, 1981).

We then move to the alleged ineffective assistance of counsel matter which was heard today. Let me first state this about defendant's trial lawyer, Mr. Adams. Perhaps it is a little difficult for a judge to evaluate effective assistance of counsel in a vacuum, especially when the judge has had that lawyer practice before him, has observed him in action, knows not only from observation but also by reputation of the lawyer's skill in criminal defense matters.

The court has always found Mr. Adams to be extremely effective counsel versed in the law and one who never forgets that the purpose is to win, if I may put it that way, in the trial court while at the same time preserving as is necessary matters for any appellate review.

One might be a little more critical of someone such as one of the lawyers called as defense witnesses before Judge Lee, who had only tried one criminal case; that lawyer was called to criticize Mr. Adams' representation which is among the most classic instances of Monday morning quarterbacking I have ever seen. The court simply does not have perhaps the same willingness to nitpick and flyspeck the actions or inactions of defendant's counsel because of the court's own observations; in fact, the court will take judicial notice of the experience of Mr. Adams. Additionally, the record is replete today with his background. A trial attorney has other things in mind called trial tactics, rather than fighting every little battle that can be fought throughout a proceedings. It is easy for lawyers to sit back six years later and say this "i" wasn't dotted, that "t" wasn't crossed just so or the slant of the crossing could have been better. That's hardly ineffective assistance of counsel. And that is the way most of the questioning has struck me today.

I must say I am glad that I had this evidentiary hearing. on Saturday, I concluded there was no reason to have it. The more I heard today, the more convinced I was of that. I shall enumerate:

The three witnesses set forth in the transcript of the post-conviction state court hearing basically boil down to this: Mr. Jepeway's describing Mr. Adams' representation as inadequate, but admitting the hadn't read the transcript. He didn't know what the Miranda statement was that he was complaining about having been admitted; if he had, he would have been aware that the statement was only as to the robbery and the defendant denied any involvement with the murder. The things Mr. Jepeway didn't know were rather significant.

The second lawyer who was called had only one criminal case in the way of experience. The lack of qualification of this witness makes "expert" status dubious in that type of hearing. In any event, the lack of qualification would cause an excess of ninety-nine percent discount of the opinion.

The third one, Mr. Von Zampft, had read the transcript, and has some experience; he presented more credible second-guessing. However, even he concluded representation of defendant to satisfy his criticism would have made no difference on the question of guilt or innocence. In other words, even the defendant's most credible expert concluded at the post-conviction relief hearing, some six years after the trial, the defendant would still have been guilty. This represents a rather obvious recognition of the overwhelming mass of evidence against the defendant. He did think it might have made a difference in the jury recommendation. That's pure speculation, of course.

In view of Judge Lee's findings, both shortly after the trial in 1975 and again two weeks ago, to speculate that the jury would have come back with a different recommendation and then speculate that Judge Lee would have changed his sentence is not just inference on inference, it's speculation on top of speculation.

I think it is significant at this point to point out that Judge Lee has been a judge in criminal court matters for many years; practiced criminal law before that, for several years as a criminal defense lawyer, as I recall; and he was a judge of several years' experience at the time this case was tried. Just two weeks ago, he indicated that this is the only time he ever imposed the death sentence.

For the benefit of the Court of Appeals, because they don't live in this community, I think it is safe to say that Judge Lee does not have a reputation as a "hanging judge," whatever that phrase may mean in the public eye, but he does have a reputation as a good judge. The imposition of the death sentence in only this one instance, this case, is significant.

As to the first witness this morning, the pathologist's testimony is rather interesting altho it didn't seem to square with other testimony in the trial. For example, the fact that several minutes elapsed in all this. The defendant shot Officer Ilyankoff without provocation or warning twice in the stomach; and while he's lying on the ground, the defendant went out to the cruiser because then he needed an escape vehicle; he came back to the officer but in the meantime the officer had called for help three times on his radio; the officer had tried to climb to an upright position. A conversation ensued, albeit brief, between the defendant and Officer Ilyankoff. It was brief because the defendant only wanted the keys to the police cruiser from Officer Ilyankoff. It was also brief because the defendant shot the officer in the back of the head at fairly close range.

The charge before me is that the failure to call Dr. Fattch was ineffective assistance of counsel. I found most persuasive and credible the testimony of the defense attorney, Mr. Adams, that he didn't want to reinforce all of this in the jury's mind. I agreed with that when he said it because I had already concluded that. I think it would have insulted the intelligence of the jury to present this testimony and then argue that this matter was not atrocious or heinous, just as I frankly felt it insulted my intelligence to present it.

Additionally, Dr. Embry, the medical examiner and a pathologist, performed the autopsy and testified about it.

As more questions were asked of Mr. Adams, the weaker the claim of ineffective assistance of counsel became. It clearly came as a distinct surprise to defendant's lawyers in this court when they were trying to challenge Mr. Adams as to his alleged failure to cross examine Ms. Buchanan, the eye witness, on her having once said that she could only see the lower half of the defendant, when they learned that Mr. Adams had gone out and examined the door. He was doing his best not to let the jury find out that you could clearly see from behind that door. Good trial tactics dictate obviously that the jury be left wondering if one can really see from inside a louvered door. That's the mark of an experienced trial lawyer.

Dr. Amin's testimony was presented with respect to the claim of ineffective assistance of counsel. I assume Dr. Amin is not trying to corner the market in any capital case where a defendant happens to be black, because Dr. Amin indicated he was the only black psychiatrist in Florida with forensic experience. The basic thrust I could find from the presentation of this evidence was that only a black psychiatrist would have sufficient socio-cultural compatability with this defendant to properly present this in court. I find that is a classic example of reverse racism and bigoted on its face. I would not find such an argument meritorious whether the argument were made in this situation or a reverse situation or in any other analagous situation involving a different racial, or religious, or gender background between the psychiatrist testifying and the defendant.

One could argue with as much force that Dr. Taubel's testimony would be received more favorably by the jury in this case and the judge in this case because he was of the same race. Obviously, that argument is specious as well. I use it only for an example of how vacuous that argument is as presented by the defendants, or at least as I assume the thrust of it to be.

In any event, Dr. Taubel testified. We are talking about December, 1975, six years ago. Dr. Taubel was certainly one of the leading, if not the leading forensic psychiatrist in this community at that time. If calling such a witness amounts to ineffective assistance of counsel, then the law has come to an exotic state quite foreign to my awareness.

As to character witnesses, I note that both the mother and girl friend of the defendant were called at the sentencing phase. I find no substance to a claim of ineffective assistance of counsel as a result of that.

I might say that I think a number of people need to be commended in this matter: Judge Lee, Mr. Satz, our present State Attorney, who was the assistant state attorney who prosecuted this matter, and Mr. Adams, whom I think did a good job.

There are certain matters that the public might wonder about, and I understand why they might. For example, why a case that was tried in December of 1975 didn't get reviewed on this basis until December of 1981. I don't know why the Supreme Court of Florida took three-and-a-half years. I don't know why it took another couple of years for the death warrant to be issued. And I don't know why the Congress of the United States doesn't enact the law that has been introduced setting forth a time limitation within which these writs of habeas corpus must be instituted. If they had, we wouldn't be here on a crash basis.

I was determined I was going to rule on this matter on the merits if I possibly could within the time allowed and I felt from the beginning that was likely to be the case. If at any time I had thought I couldn't finish, I would have stayed the matter. There would have been no choice.

It is true; defendant has a right to appellate review of this court's findings. I iterate that I shall examine the transcript when it's prepared and undoubtedly modify, perhaps amplify wherever this court deems necessary in an effort to provide an order of more assistance to the Eleventh Circuit. I trust they will recognize that it's not as polished as it might have been. I did not want to delay ruling because I did not want this court to be responsible for any further delay in the matter which has been delayed for too long. Rather clearly, when a crime as heinous and as reprehensible as this one as presented to the jury as in this case, then the execution should have been carried out a long time ago. Society deserves no less.

The court's formal finding and conclusion is that the petition for writ of habeas corpus is without merit; it is denied; and the motion for stay is denied.

I have discussed the matter with a judge in the Eleventh Circuit and advised him after the evidence was concluded and arguments have been waived that I had arrived at a conclusion, and informed him of it. He advised that the Court of Appeals would give me time to announce my findings and conclusions from the bench, and then enter a stay in order to permit the defendant to receive an effective appellate review. Apparently, that may well have been done. The execution scheduled for tomorrow morning, I'm advised, has been stayed by the Eleventh Circuit.

The burden is upon the Attorney General's Office of the State of Florida to notify the warden of that. It is not on this court. The Court of Appeals made it abundantly clear that this administrative matter had to be carried out because they were concerned that if they issued the stay after 5:00 o'clock, there might be some difficulty in making sure that the stay was effectively communicated to the warden. That, of course, the Attorney General's Office can do, and I direct that you do that.

WHEREFORE, the petition is denied and the motion for stay is denied.

DONE AND ORDERED this 10 day of December, 1981.

Norman C. Roettger
U. S. District Judge

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JIM SMITH
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State of Florida

January 6, 1982

Honorable Strom Thurmond
Chairman, Senate Judiciary Committee
Suite 2226 Dirksen Office Buiding
Washington, D.C. 20510

Re: S. 653, reforming federal habeas corpus procedures concerning federal review of state criminal convictions

Dear Senator Thurmond:

In his year-end report on the judiciary, Chief Justice Warren Burger has again called for Congress to revise federal district court jurisdiction for collateral review of state criminal convictions. Previously, in his annual speech to the American Bar Association in Houston on February 8, 1981, Chief Justice Burger urged Congress to restore greater finality to state criminal convictions by preventing endless attacks in federal court on these convictions.

In his current year-end report, dated December 28, 1981, relevant portions of which I have enclosed, Chief Justice Burger urges Congress to promptly consider limiting federal collateral review of state court criminal convictions. He notes: "The administration of justice in this country is plagued and bogged down with lack of reasonable finality of judgements in criminal cases." (p.21). S. 653 is designed to achieve the objectives expressed by the Chief Justice so that greater finality and certainty occurs in our criminal justice system. I urge your prompt action in support of this bill.

Sincerely,

Jim
Attorney General

JS/Tmb
Enclosure

YEAR-END REPORT ON THE JUDICIARY

BY

Chief Justice Warren E. Burger

INTRODUCTION

This year marks the 75th anniversary of Roscoe Pound's now famous 1906 address on "The Causes of Popular Dissatisfaction with the Administration of Justice." We have made progress in solving a number of yesterday's problems, but as society turns more and more to the courts for solutions -- a task judges do not seek -- new problems continue to press themselves. Indeed, yesterday's solutions sometimes become today's problems, for many solutions generate yet more grist for judicial mills. Pretrial procedures, for example, were instituted to speed litigation. Uncontrolled, they are often used by some to frustrate the very goals they were instituted to achieve. In certain respects, as Pound said in 1906, the administration of justice continues to be "behind the times."

Five years ago, the American Bar Association, the Judicial Conference of the United States and the Conference of Chief Justices sponsored the "Pound Revisited Conference" in St. Paul, Minnesota. The conferees recognized in 1976, as Pound said in 1906, that "there is more than the normal amount of dissatisfaction with the administration of justice in America. Assuming this, the first step must be diagnosis." On the occasion of that Conference I urged those who administer justice to begin to propose an "Agenda for 2000 A.D." -- a systematic plan (consisting of research, experimentation and ultimately action) to anticipate the future.

As Lawrence Edward Walsh, then ABA President, stated at the 1976 Conference: "[W]e are obligated to make our system work, to get something better for the public." Pound's contributions, and the results of his thinking, continue to stimulate the kind of thought and action which can help us to meet that obligation. Against that backdrop, the following noteworthy highlights of 1981 developments are presented.

JUDICIAL WORKLOAD AND PRODUCTIVITY

Caseload

To no one's surprise, federal case filings continued to mount, playing out a general fifteen-year trend:

-- Cases docketed in the Supreme Court grew to 4,174 in the 1980 Term, a 4.7% increase over the previous Term.

-- Court of Appeals filings increased even more dramatically to 26,362, almost a 14% increase over the last judicial year.

-- District Court filings expanded to 211,863, a 7% increase over the last judicial year.

The problem these case filings present is not simply workload on the courts or delay for the litigants, but a real threat to the quality of federal justice. As then Solicitor General Robert Bork put it at the Pound Conference, "we are thrusting a workload upon the courts that forces them towards an assembly line model."

The future gives no promise of relief. According to recent statistical projections prepared by the Administrative Office of the United States Courts, Court of Appeals case filings will rise between the judicial years 1975 and 1983 by 80%. This represents

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There is a growing concern about federal District Court jurisdiction by way of collateral review of state court convictions. In his 1981 Morrison Lecture to the California State Bar Association, Judge Carl McGowan of the U.S. Court of Appeals for the District of Columbia Circuit said:

> "A state prisoner who has unsuccessfully exhausted his avenues of state trial and appellate relief can, even many years later when retrial is not practically feasible, attack that conviction in the Federal District Court as violative of federal law, and procure his release if such a violation is established."

He went on to say that

> "Congress might well consider the abolition of collateral attack by state prisoners in the federal courts, at least in certain kinds of cases . . . . [Federal Courts] should not have to exercise a supervisory authority over the administration of state criminal laws unless that is plainly necessary in the interest of justice."

Judge McGowan has made an important point and I hope Congress will promptly consider limiting federal collateral review of state court convictions to claims of manifest miscarriages of justice. The administration of justice in this country is plagued and bogged down with lack of reasonable finality of judgements in criminal cases.

In the 1980 Year-End Report I noted: "There are signs that state and federal dockets are becoming more and more alike and that the federal system seems to be on its way to a de facto merger with the state court system. There are risks that this trend will undermine accepted principles of federalism."

This year legislative steps were taken to address this problem. On March 10, 1981 a bill to establish a Federal Jurisdiction Review and Revision Commission was introduced by Senator Strom Thurmond along with Senators Howell Heflin, Dennis DeConcini (Arizona), Alan Simpson (Wyoming), and John East (North Carolina). The bill was referred to the Senate Judiciary Subcommittee on the Separation of Powers on March 17, 1981.

The proposed Commission would study state and federal courts' jurisdictions and report any recommendations to the President and to Congress. The sixteen-member Commission, appointed by the heads of the three branches of government, would be required to submit a final report to the President and to Congress within two years of its first meeting. Operations would then cease ninety days after the Commission submitted its final report.

Rulemaking

The Judicial Conference's Standing Committee on Rules of Practice and Procedure, chaired by Chief District Judge Edward T. Gignoux (Maine), has begun its work on a formal statement describing rulemaking procedures. That statement will be considered at the March 1982 meeting of the Judicial Conference. These efforts will further enhance public understanding of the formation of the rules which govern the operations of our federal courts.

In light of the Supreme Court Justices' ever-mounting burdens, it remains uncertain whether the Justices should set aside the time and effort required to examine proposed rules

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Senator HEFLIN. Now it is my pleasure at this time to call to the witness stand the Honorable C. C. Torbert, Jr., chief justice of the Supreme Court of Alabama, who was a distinguished lawyer, a great legislator, in fact was the legislator that handled in legislation a great deal of the judicial reform measures that Alabama went through a number of years ago, and is now the chief justice. It is a great pleasure to have such a distinguished statesman from the South, the State of Alabama, with us.

STATEMENT OF C. C. TORBERT, JR., CHIEF JUSTICE, SUPREME COURT OF ALABAMA

Judge TORBERT. Thank you so much, Mr. Chairman.

I could not help but observe that during the time period that it was "Florida day" here, that the distinguished Senator from Florida, Senator Chiles, paid high compliment to Attorney General Smith and then Senator Chiles waited a few moments during the testimony of General Smith to await the similar compliment back from him.

Accordingly, having never testified before the Senate Judiciary Committee or any subcommittee thereof, very quickly I have learned that it is now time for the chief justice of Alabama to say to the distinguished Senator from Alabama what a wonderful job he is doing in protecting the citizens of our State, promoting the Tennessee Tombigbee, the peanut quotas, and a long, long laundry list of other efforts that you are making on our behalf. [Laughter.]

Now having said that and discharged that obligation and responsibility, I will not read very much of my prepared statement, which will be in the record and can be distributed to anyone who wishes to see it. I will say this: That as early as 1960, long before my time and even your time, the Conference of Chief Justices of this Nation had been concerned about Federal postconviction review of State criminal decisions.

It has been of concern since that time, and more recently I chaired a subcommittee of the Conference of Chief Justices in this area. There are many proposed solutions, one of which is not before this subcommittee but is a proposal to establish a National Court of State Appeals, which will be heard some time next week, I think.

The Conference of Chief Justices in August of this year adopted a resolution, in effect recommending approval in principle of the subject matter of S. 653. That speaks on behalf of the conference, and I understand it will be on file and subject to review by committee members and staff.

I come before this committee not representing that conference, although a member thereof, but I come as the chief justice of the State of Alabama. I would like to first say that in July of this year, before the joint meeting of the Alabama State Bar and the bench, I made this statement that I think will focus some attention on the overall policy problem: The challenges faced by the courts and the legal profession relate to some extent to the public's perceived role that our legal and court systems should play in the protection of society generally, as distinguished from the routine functioning of the justice system. In my judgment, this perception relates to the feeling of a majority of our citizens that it is society that is the underdog rather than the convicted criminal defendant pleading for mercy. There is a feeling in many cases that the punishment does not appear to fit the crime; that litigation costs too much, takes too long, and is never over; and lastly—perhaps here you can focus some attention—that court decisions protecting constitutional rights is a game that defendants win and society loses.

Therefore, the question then before both the Federal courts, the Congress, and the State courts as well as the State legislatures, is: Shall we continue to live with a system which breeds lack of finality in the ordinary criminal case, with endless postconviction reviews—and now speaking from viewpoint of State courts—postconviction review by our brother and sister judges of the Federal courts?

Of all of these issues in the criminal justice system, issues of intense interest and importance, the one with respect to finality seems to be one worthy of the immediate attention of the Congress, the Federal courts, and the State courts. From the State court level, State courts should fashion their procedure to mandate consideration, first, at the trial court level, a determination of the Federal constitutional issues, those issues that the Federal courts usually deal with in their postconviction review; and, second, at the appellate level State courts should provide for a unification of these issues in the appellate court review of criminal convictions.

From the standpoint of our State, we have now under consideration and in the process of adoption a whole body of proposed rules of criminal procedure which in my judgment will do our part with respect to the full and fair consideration of Federal constitutional issues. That is not to say that this is not being done at the present time, and I will address that a little bit later on.

However, I want to make this statement to the subcommittee: one, that State courts do consider Federal constitutional issues; State courts are competent to deal with and decide these issues; State judges come from the same rank-and-file legal professionals from which Federal judges are selected; and, lastly, State courts ought to be trusted.

My hope to this committee and to the brothers and sisters on the Federal bench is that Congress and the Federal courts should respond by recognition of these facts. Our legal system, State and Federal, must within constitutional safeguards devise some type of finality of appeal and in the seemingly never-ending routes through the State and Federal systems which circumvent justice being carried out effectively. This is the challenge of the State bench, the Federal bench, and now before this committee of the Congress.

It seems to me—and many of these things have been said before—that Federal habeas corpus reform, in whatever specific and result-oriented measures that come out of this subcommittee and this Congress, is necessary to insure the integrity of the criminal justice system in the country. Our criminal justice system is founded on federalism and one of its chief goals is finality. It is dependent upon public respect and support. All three of these essential pillars of our system are being impaired, and we need to do something to save the fundamental values of the criminal justice system.

When you talk about these issues you must focus attention on one obvious fact, and that is that the State court system, the prosecution and defense functions, has the principal responsibility for the operation of the criminal justice system in the country. The U.S. Supreme Court has recognized this in a long line of decisions, that is the primacy of State government in this area, and yet it would appear to at least this one State court judge that an overextension of the use of habeas corpus has frustrated honest judges of the State courts who have ability and integrity.

Let me just give you this example, for instance, as to the review process in terms of manpower. In observing the Alabama State appellate system, of course I know the background and the caliber of the judges who serve in it. We have a five-member intermediate criminal court of appeals where all the criminal cases are first reviewed from the trial level. Those judges have a total of 42 years experience on the bench and more than 125 years of combined legal experience.

Our State supreme court, which again reviews the decisions by writ of certiorari from the court of criminal appeals, is a nine-member court whose judges at the present have a total of 89 years experience on the bench and over 250 years of combined legal experience.

State appellate judges are as learned in the law as U.S. district judges, and it is frustrating to members of the State judiciary to see these matters reviewed—many, many years subsequent to final conviction—by one single member of the Federal judiciary.

In sum, the destruction of federalism through the overextension of the writ of habeas corpus in recent years is not justified nor is it wise.

Let me, Mr. Chairman, digress for 1 minute to meddle in other matters that may be pending before this Congress. I read and hear about jurisdictional legislation with respect to our Federal courts that will probably be heated in terms of debate this year and perhaps next year.

It seems to me that addressing this problem by legislation in the habeas corpus field is modest. It is not dramatic but it addresses a problem that if the general public were aware on a day-to-day basis as to what happens—concededly in isolated cases—in our criminal justice system, the public simply would lose more and more respect for our criminal justice system as a whole.

The public has reason to question the basic integrity of a system that on the one hand espouses that swift and certain punishment is essential to protect society but on the other hand condones a dual system of appeal in which facts and legal issues are indeterminately litigated and never finally decided.

Now whether you monkey with the language and hear from the Department of Justice as the proper approach to the statute of limitations is not the real issue. The real issue in the case is that something must be done in order to restore a degree of confidence and support in our criminal justice system.

I want to emphasize that those of us who support Federal habeas corpus reform do not in any way depreciate the historical significance of the great writ or the importance of the legitimate purpose of the writ when it can and should serve, but overextension of the writ beyond any reasonable scope in recent years and the use of it in circumstances for which it was never intended will ultimately weaken both the writ itself and the criminal justice system in our country.

I think that the same Founding Fathers who expressly referred to the writ of habeas corpus in the Constitution also deliberately chose federalism as the basic governmental structure of this country, and they enshrined that choice in this great document no less than any other principle. The Founding Fathers knew, as we must realize, that no government system can function properly without the respect and support of its people.

For that reason, if our criminal justice system is to operate effectively and efficiently, indeed if it is to endure, we must restore some semblance of institutional sanity to the system. Senate bill 653 is a step in that direction.

Thank you very much.

Senator **Heflin**. Thank you, Chief Justice Torbert.

Let me see if I can illustrate where we are and what procedural and hearing protections are provided in the State of Alabama when a person is charged with an offense: He has a right to have a preliminary hearing before a judge to determine whether or not there is probable cause.

Judge **Torbert**. Probable cause.

Senator **Heflin**. That is one hearing that occurs. Then before he is brought to trial, in the normal course of events a grand jury considers his case and determines whether there is probable cause. He does not have an opportunity at that time to present any of his side; at the preliminary hearing he can. He can make his choice.

If the grand jury indicts, then he goes to trial and he has all of our Federal, constitutional rights, having right of counsel, various decisions that have been held pertaining to rights of discovery. He has a trial. If he is found guilty by a jury, he then has an opportunity to file a motion for a new trial and then to have a hearing at that time, a new trial hearing before the trial judge that heard him.

Judge **Torbert**. That is correct.

Senator **Heflin**. There are sometimes other types of things but basically they are combined in a new trial hearing. Then if the judge overrules the motion for a new trial, he has an opportunity to take an appeal. If he is indigent, counsel is appointed for him. A transcript is made, this, of course, for reasons of Federal law.

Judge **Torbert**. That is correct.

Senator **Heflin**. He then in Alabama goes before the court of criminal appeals. He has an opportunity there to have his case heard, oral argument, and determined. If the court of criminal appeals then affirms the conviction, the decision of the lower court, he then has an opportunity to file a motion for a rehearing before the court of criminal appeals. That court of criminal appeals considers it on the question of a rehearing then.

Then he has the right under Alabama law to file a petition for certiorari to the Supreme Court of Alabama. If that writ of certiorari is granted, he then has an opportunity to have a hearing before the Supreme Court of Alabama for a determination of whether or not the court of criminal appeals was correct in affirming his conviction.

Then he has an opportunity to file a petition for a rehearing before the Supreme Court of Alabama. If that is denied, he then is a position to go to the U.S. Supreme Court where he can file a petition for certiorari outlining constitutional, Federal issues that might have been involved. That petition is either granted or it may not be granted but we will assume that it is granted. Then he comes before the Supreme Court of the United States for a hearing on that.

If the U.S. Supreme Court then determines that the State courts were correct and does not reverse their opinion, he has an opportunity to file a motion for rehearing there. I do not think the U.S. Supreme Court grants many new hearings but anyway, it is there.

Then of course that has gone to the U.S. Supreme Court. Then on post conviction he raises an issue, "I had incompetent counsel," or that something else deprived him of a fair trial. Under the Alabama law he would file a petition for error coram novis, I believe.

Judge **Torbert**. A writ of error coram novis, that is correct.

Senator **Heflin**. Then that would go to the trial court. Then that error coram novis, if it were denied, would be subject to a rehearing process. If that were denied it would then go to the Alabama court of criminal appeals.

Judge **Torbert**. The same process.

Senator **Heflin**. The same process: I am just going through all these numbers and showing the procedure.

The Alabama court of criminal appeals, he would then have a right for a rehearing. Then he could file a petition to the Supreme Court of Alabama for certiorari, at which time he would be entitled to a hearing and then a petition for rehearing on finality.

All of those now, as I count that it is 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 different hearings that he goes through then before, in effect, he can go into the Federal court for a petition for habeas corpus. Then after he goes into that, if he is denied on that issue he then goes through a process with the district court. Then it can go to the circuit court of appeals and then go to the Supreme Court.

Then if that is not successful he can later file that he had incompetent counsel in relation to his error coram novis, if that counsel was different from the other. In other words, the number of hearings and proceedings can go on indefinitely——

Judge **Torbert**. Endlessly.

Senator **Heflin** [continuing]. And endlessly in regard to this.

Now maybe not all States have the protection as we do in Alabama on petitions for writs of error coram novis. I do not know but I have heard that there have been people who constantly file these, that over a matter of 10 years may have had 50, 60 hearings that could have come up. This would be the rare case, it is not the unusual case. I mean, this would be an unusual case, 50 or 60, but in the normal course of events before he goes to that he has had generally 17 opportunities and 17 hearings in the State courts before he would go to the petition, in order that he might have his rights protected.

Judge TORBERT. That is a very well-put definition of the problem that a member of the public would be up in arms about, if we said that even after the 17 enumerated opportunities, that that person whose case had been reviewed now has another bite not at the apple but at many, many apples.

I will make one final comment that I did not make, but it has been written and I think there is a great deal of underlying truth to some of the problems in Federal habeas corpus review. That has been a basic mistrust in the past as to State court procedure and decisions. I would have to say in this time, these times, that should no longer be a valid concern of those who are concerned about rights of prisoners and rights of convicted defendants.

Thank you very much, Mr. Chairman.

Senator HEFLIN. Thank you.

Do you have any questions, Mr. Velde?

Mr. VELDE. No questions, Mr. Chairman, just one observation: In view of this procedure which you have outlined which the Alabama criminal courts follow in affording the accused their rights, I just wonder what you did with all that LEAA money that was supposed to be streamlining the procedure in Alabama? [Laughter.]

Senator HEFLIN. Well, he wanted to assure that the constitutional rights of the defendants were properly protected, Mr. Velde.

That was long beforehand and is really the result of some Federal court decisions that almost require that, I mean, the fact that there be evidentiary hearings on postconviction remedies. In the early sixties the fifth circuit complimented the Alabama court—I was not a member of the court at that time—for their procedures in affording rights to those that were accused, rights to have a procedure to determine post conviction claims.

Really, this has come about in most places—it may be more because we have a court of criminal appeals and have more hearings in Alabama—but the requirement of first having an evidentiary hearing in a determination on post conviction remedy is a general requirement that has come about as case law from the Federal courts.

Yes?

Judge TORBERT. I want to make one last statement. I think it is instructive. The Senator from Florida, the attorney general from Florida, and I in my remarks have made some reference to the overextension or the overbroad application of the great writ.

I would like to simply call to the attention of the subcommittee a very recent U.S. Supreme Court decision which I think typifies the overly broad application of the writ. The name of the case is *Snead* v. *Stringer*. It was on petition for writ to the U.S. Circuit Court of Appeals, Fifth Circuit.

It was denied November 2, 1981 but with a dissent by Justice Rehnquist, the Chief Justice, and Justice O'Connor. It was an interesting dissent because as Justice Rehnquist put it, these building blocks with respect to Miranda rights have been overly extended. In this case we all recognize the right to counsel; we all recognize the *Brewer* case, *Masia* case, which in effect says once you are indicted and you have counsel, that the prosecution simply cannot go out and deliberately take a statement from the defendant.

In this particular case, what happened was that it was the district attorney who was calling the defendant, who happened to be the custodian of the records of a city in the State, to find out if the prosecution could have access to the records. The defendant voluntarily said: "Of course, you can have access to the records but it will not be really necessary. I signed Mr. Malone's name to a draft or check expending public funds."

Now that issue was testified to on behalf of the district attorney. It was objected to. It was allowed. It went through the process but the interesting thing is this: The court of criminal appeals and our court affirmed the conviction because that was not really the issue. At trial the defendant himself admitted signing the other man's name to the check but the defense was that he had permission.

It goes through the State process; it goes into the Federal court. The U.S. district judge on habeas corpus ordered a new trial. It came up through the process and the U.S. Supreme Court denied cert, which means he gets a new trial.

The State court position through its written opinion was that even if it was error, it was harmless error because the defendant never made an issue of that fact. The defendant admitted that and yet the defendant gets a new trial—simply an example of an overbroad extension of the great writ.

Thank you.

[The prepared statement of Judge Torbert and a resolution of the Conference of Chief Justices follows:]

PREPARED STATEMENT OF C. C. TORBERT, JR.

I appreciate this opportunity to appear before you in my capacity as Chief Justice of the Alabama Supreme Court. I appear in support of Senate Bill 653 which addresses an issue which has concerned me in recent years -- the present overly-broad scope and application of federal habeas corpus. While the writ of habeas corpus is one of the great legal remedies of the English system of justice, I believe that the originators of the writ would scarcely recognize it in its present applications.

This bill is an important piece of legislation to be considered by this Congress. It is important because federal habeas corpus reform is necessary to ensure the integrity of the criminal justice system in this country. Our criminal justice system is founded on federalism; one of its chief goals is finality of judgments; and the system is dependent on public respect and support. All three of those essential pillars of our system have been seriously impaired and are in danger of being destroyed by overextension of the federal writ of habeas corpus. Senate Bill 653, or legislation like it, is necessary to save the fundamental values of our criminal justice system and to safeguard the integrity of our judicial process.

Federalism is embodied in our organic law and is no less important than any other concept that the founding fathers wrote into the United States Constitution. Our government in general and our criminal justice system in particular are based on federalism. Yet encroachment of federal courts onto the state court system through an overly-broad application of the federal writ of habeas corpus threatens to make federalism a museum piece as far as our criminal justice system is concerned.

It is clear that state governments have the principal responsibility for criminal justice in this country. States perform the vast majority of the work in this field, and time and time again the United States Supreme Court has recognized the primacy of state jurisdiction over criminal law. Yet in recent years the federal writ of habeas corpus has been so egregiously overextended that state court judgments have been denigrated and state court judges have become frustrated members of the judiciary.

The present state of federal habeas corpus law is such that federal district court judges and federal magistrates routinely sit in judgment of state court decisions and determinations. Although a defendant is tried in state court and his federal constitutional claims have been considered by state court judges, that defendant is free to collaterally attack the state court judgment in federal district court. If a state convict can convince a federal district court to second guess the state courts on any of the myriad of constitutional issues that routinely arise in a typical criminal case, his conviction can be overturned.

Indeed, the situation can be so extreme that even after having his claim thoroughly considered and rejected at three levels of state courts by more than a dozen state court judges, a convicted criminal can still have his conviction overturned simply because a single federal district court judge disagrees with all of the state court judges who have previously ruled on the claim. Furthermore, when factual matters are dependent on the resolution of conflicting testimony, state courts can be and often are overruled by a federal magistrate whose decisions concerning the credibility of witnesses usually are not redetermined by the federal district court judge. On constitutional issues, the highest court of a state can be reduced to little more than a lower court subservient to federal district judges and federal magistrates. The present broad view of federal habeas corpus has as its basis a mistrust of state courts as fair and competent forums for adjudication of federal rights. While historically there have been differences in procedure between state and federal courts, and it could be claimed that state courts were not sympathetic to federal constitutional claims, there is at the present time no reason to presume a lack of appropriate sensitivity toward constitutional rights in state trial and appellate courts. Moreover, since Mapp v. Ohio and the general imposition of federal constitutional guarantees on state court procedure, judges at all levels of state judicial systems deal with constitutional issues daily. There is no intrinsic reason to think that one judge is fairer or more competent than another.

In my short tenure as Chief Justice of the Alabama Supreme Court, I have observed first hand and on a daily basis the functioning of a state appellate system, and I know the caliber of the judges who serve in it. Let me tell you about the background and experience of the judges who decide criminal appeals in our state. We have a five-member intermediate criminal appellate court whose judges have a total of 42 years' experience on the bench and more than 125 years of combined legal experience. Our state supreme court, which reviews decisions of the criminal appellate court, is a nine-member court whose judges have a total of 89 years' experience on the bench and more than 250 years of combined legal experience. Our state appellate judges are as learned in the law as our federal judges.

Clothing a lawyer in federal court robes does not magically infuse him with more legal and judicial ability. There is nothing about the process of selecting federal court judges that makes a man who is selected any more qualified to decide constitutional issues arising in a state criminal case than the state appellate judges who have decided those issues before him. Our state appellate court judges, like those in other states, are qualified to properly decide constitutional issues, and they are as sensitive to federal constitutional concerns as any of their counterparts of the federal courts. Our state court judges take an oath to support and defend the United States Constitution just as federal judges do, and they are as dedicated to that great document as their brothers and sisters on the federal bench.

In sum, the destruction of federalism through the gross overextension of habeas powers in recent years is neither justified nor wise. It should be remedied.

The second essential concept or goal of our system of criminal justice is finality of judgment, and it too is being seriously impaired by overextension of the federal writ of habeas corpus. What has been created over a period of years is a dual system of appeal. It is a daily occurrence for a defendant to exhaust his state appellate remedies up to and through certiorari to the United States Supreme Court, and then years after his conviction to file a petition in federal court for a writ of habeas corpus, thereby beginning a long and circuitous climb through the federal court system. Presently, federal habeas corpus is almost unique in the law in that there is no specific period of time within which a petition for habeas corpus must be presented. As a result, petitions are filed and often granted years and even decades after the original conviction has been upheld in the state appellate courts.

It has become a common tactic for convicted criminals to delay a number of years after the final state court decision affirming their conviction before launching an attack on that conviction in a federal habeas corpus proceeding. This delay tactic serves a dual purpose for the criminal. First, the passage of time makes it more difficult for the state to rebut any factual allegations of the habeas petitioner, thereby enhancing the chances that the federal court will overturn his state court conviction. Secondly, delay also makes it more difficult for the state to successfully retry the criminal if his conviction is overturned, because witnesses die, memory fades, and evidence deteriorates or becomes lost. That is why so many convicted criminals play the waiting game, and that is why some statute of limitations is needed to prevent such an abusive tactic which serves to free the guilty and destroy any notion of finality. Until some effective statute of limitations is enacted for federal habeas corpus proceedings, there will be no finality of judgment in state criminal cases.

The third essential component or goal of our system of criminal justice is public respect and support, and it has two aspects. The first is the public's respect and support of the state court system, and the second aspect is the public's respect and support of the criminal justice system as a whole. Over-broad applications of the federal writ of habeas corpus have undermined both.

We cannot expect the public to give any state court system the maximum respect and support it needs when the decisions of the highest court of the state are routinely subject to being reviewed and overturned by a single federal court judge or magistrate of the more than a thousand federal district court judges and magistrates in the country. Nor can the public be expected to respect state court judgments so long as those judgments do not command respect in federal court.

The current status of the law involving collateral attacks on state court judgments also engenders disrespect for the criminal justice system as a whole. The public has reason to question the basic premises of the system when a state court judgment reflecting the considered views of jurists with a combined total of more than a hundred years of judicial experience can be cast aside whenever a single federal judge or magistrate simply disagrees with the state court judges. The public also has reason to question the basic integrity of a system that on one hand espouses that swift and certain punishment is essential to protect society, but on the other hand condones a dual system of appeal in which facts and legal issues are interminably litigated and never finally decided.

If we care anything about federalism, about finality of judgment, and about public respect and support for our system of criminal justice, then steps must be taken to correct the damage which has been done to those three components or goals of our system by the overextension of the writ of habeas corpus in recent years. The concept of Senate Bill 653 is a major step in the right direction.

Section 1 of Senate Bill 653 effectively bars magistrates from making the kind of factfindings in habeas corpus cases that will lead to state court judgments being overturned. This change in the law is important, because it will mean that if a state conviction is overturned because of findings of fact made in federal court the crucial factfindings will at least have been made by the federal district judge himself rather than by a magistrate. Federalism demands that no state court judgment should be overturned in federal court as a result of findings made by a non-Article III judge such as a magistrate, and Section 1 of the bill will guarantee that that does not happen.

Section 2 of Senate Bill 653 is important for three reasons. First, by codifying the "cause and prejudice" requirement of Wainwright v. Sykes, 433 U. S. 72 (1977), and by defining "cause" in terms not easily evaded, this section of the bill will require that state courts have been given an opportunity to rule on an issue before a federal habeas court considers overturning the state judgment because of that issue. Such a requirement promotes federalism. This codification and a statutory definition of "cause" is necessary as at least one federal court of appeals has ruled that "cause" can exist where a defendant failed to raise an issue because of incompetence of counsel even where the failure to do so does not amount to constitutional error.

Secondly, Section 2 of the bill will change the statute so that it expressly specifies as a threshold requirement for federal habeas relief that the petitioner prove that the alleged violation of his federal rights "was prejudicial to the petitioner as to his guilt or punishment." This addition to the statute will increase the finality of judgments and bolster the public's respect for the system. The finality of judgments and public respect for the system will also be increased by the third aspect of Section 2 of the bill -- the addition of what amounts to a statute of limitations for federal habeas claims. Such a limitation is absolutely necessary if there is to be any finality of state court judgments. In addition, this would eliminate the aforementioned technique often utilized by prisoners of waiting to file for habeas petition until the state's witnesses have died or the convicting evidence is unavailable, thus preventing the state from showing why a validly convicted prisoner should remain in custody. This section provides an exception to the three-year period running from conviction where the federal right of which the prisoner is availing himself is newly created by the courts in such cases allowing the three-year period to run from the date of creation of the right. Surely, in this day of court appointed attorneys for all felonies, this period is long enough to protect all rights that a defendant intends to raise.

Section 3 of Senate Bill 653 is perhaps the most important section of all. Under present law, the findings of fact of a state court are to be "presumed to be correct," and thus the federal court is not to make its own findings of fact, unless it is shown otherwise or the state admits otherwise. However, federal courts have repeatedly treated this language as permitting them to hold evidentiary hearings regardless of what the state court record shows. This amendment, changing the language to prohibit the federal court from redetermining the facts of a case unless certain circumstances exist, is necessary in order to prevent federal courts from disregarding state court decisions without just cause.

Other language of Section 3 goes further in requiring federal courts to honor state court decisions. In sum, they prohibit the federal court from setting aside the state court factfinding unless the state procedure was not adequate to afford a full and fair hearing. Present §2254(d) allows a federal court to make its own factfinding if either the state court procedure is inadequate to afford a full and fair hearing or the defendant did not in fact receive such a hearing. This second aspect of §2254(d) allows a defendant to fail to present certain facts to a state court, whether through negligent or deliberate omission, and then get a second factual hearing in federal court. This flies in the face of the intent of Wainright v. Sykes of requiring a defendant to bring any issues before a state court for decision rather than hold back in hopes of a reversal in federal courts.

There are those that argue that limiting federal habeas corpus is impairing a great concept of our law. This is not so. In fact, we will be returning to a legal remedy much closer to the original limits of the writ which has been greatly distorted in its extension. Only then will habeas corpus be what it was intended, an extraordinary writ to be utilized on occasion to correct the occasional abuses of our system of justice rather than a second mode of appeal. To illustrate the extent to which federal habeas corpus is abused, let me point out some statistics. In 1979 a study of federal habeas corpus was completed on behalf of the Federal Justice Research Program, at the request of the U. S. Department of Justice. This study involves a cross section of courts of various federal districts. It was found that only 3.2% of all petitions filed were successful in obtaining for the petitioner any type of relief. Within the heading of "any type of relief" would be included the granting of a new trial in state court at which the petitioner was convicted of the same crime. It also includes many cases in which the petitioner was granted relief because the length of time since the original conviction precluded the state from producing even enough evidence to rebut the bare allegations of the petition.

In conclusion, I would like to emphasize that those of us who seek federal habeas corpus reform do not in any way deprecate the historical significance of the writ or the importance of the legitimate purpose the writ can and should serve. But overextension of the writ beyond any reasonable scope in recent years and the use of it in circumstances for which it was never intended will ultimately weaken both the writ itself and the criminal justice system of this country. Let us remember that the same founding fathers who expressly referred to the writ of habeas corpus in the Constitution also deliberately chose federalism as the basic governmental structure of this country, and they enshrined that choice in the great document no less than any other principle. The founding fathers knew, as we must realize, that no governmental system can function properly without the respect and support of the people. For that reason, if our criminal justice system is to operate effectively, indeed if it is to endure, we must restore some semblance of institutional sanity to the system. Senate Bill 653 is a major step in this direction.

Conference of Chief Justices

CHAIRMAN
Albert W. Barney
Chief Justice
Supreme Court of Vermont
111 State Street
Montpelier, Vermont 05602

Secretariat
National Center of State Courts

October 30, 1981

The Honorable Robert Dole
United States Senator
Chairman, Subcommittee on Courts
Committee on the Judiciary
Washington, D.C. 20510

Dear Senator Dole:

May I thank you on behalf of the Conference of Chief Justices for your invitation of October 15, 1981 to submit written comment on Senate Bill 653, a bill to modify federal habeas corpus procedures. I am pleased to report that the Conference, at its last annual meeting, endorsed by resolution the general principles of Senate Bill 653 as amendments to Title 28 of the United States Code. I hope that this letter will be made part of the hearing record, so that the Conference may be tallied among the supporters.

The resolution of approval is as follows:

WHEREAS, a substantial number of duplicative, overlapping, and repetitive reviews of state criminal convictions in the federal courts unduly prolong and call into question state criminal proceedings without furthering the historic purposes of the writ of habeas corpus; and

WHEREAS, legislation has been introduced in both houses of the United States Congress to modify or codify current federal law to accommodate better the interests of both the federal and state courts in enforcing federal constitutional safeguards, and in assuring consistent application of existing federal case law; and

WHEREAS, adoption of these legislative proposals would enhance the finality of state criminal processes and give appropriate recognition to state court proceedings and factual determinations; and

WHEREAS, these legislative proposals would be in the interests of comity between state and federal courts and the orderly administration of criminal justice nationwide.

NOW, THEREFORE, BE IT RESOLVED THAT:

(1) The Conference of Chief Justices concludes that the enactment into law of the general principles of the proposed amendments to certain sections of Title 28 of the United States Code contained in S. 653 and H.R. 3416 relating to habeas corpus proceedings will contribute to

the orderly and timely presentation of claims on behalf of state prisoners, enhance the finality of state criminal processes, and assume proper respect for state court factual determinations; and

(2) The Conference of Chief Justices respectfully recommends to the Congress of the United States that it enact into law the general principles contained in S. 653 and the companion House Bill, H.R. 3416.

Adopted at the 33rd Annual Meeting in Boca Raton, Florida, August 5, 1981.

It should be understood that the issues involved in the resolution were placed before the full Conference in open session, with full opportunity for discussion, by the Resolutions Committee and agreement by that body was forthcoming. The text of the resolution was developed by our Resolutions Committee in the light of the following understanding about the proposed legislation:

a. Require all federal *habeas corpus* evidentiary hearings to be conducted by a United States district judge rather than a federal magistrate,

b. Codify the decision of *Wainwright v. Sykes* to bar federal *habeas corpus* review of the admission of an inculpatory statement unless objected to at trial, absent showings of cause and actual prejudice,

c. Establish reasonable time limits within which a federal *habeas corpus* action must be commenced, and

d. Codify the decision of *Sumner v. Mata* barring federal *habeas corpus* evidentiary hearing where the record in the state court provides a factual basis for the state court findings and such record was made under circumstances affording the *habeas* petitioner a full and fair hearing on the factual issue.

It is my understanding that Chief Justice C. C. Torbert of Alabama, a member of our Committee on Federal Review of State Court Convictions, does intend to be present and testify in person concerning the interest of his Court in this problem. I am sure you will find him well informed and articulate in speaking about the impact of federal habeas corpus activities on courts with which he is most familiar.

I thank you again for the opportunity to put before your Committee the position of the Conference of Chief Justices.

Sincerely,

Albert W. Barney
Chairman
(Chief Justice - Supreme Court of Vermont)

Senator HEFLIN. We will stand in 5-minute recess and then we will resume.

[A brief recess was taken.]

Senator HEFLIN. We will call the hearing back to order.

Next we have the Honorable Arthur L. Burnett, magistrate, U.S. district court, Washington, D.C., and the Honorable James T. Turner, magistrate, Eastern District of Virginia, Norfolk, Va., on behalf of the Committee on Legislation, National Council of United States Magistrates. We welcome you gentlemen.

STATEMENT OF ARTHUR L. BURNETT, MAGISTRATE, U.S. DISTRICT COURT, DISTRICT OF COLUMBIA

Mr. BURNETT. Good morning, Mr. Chairman.

The National Council of United States Magistrates appreciates this opportunity to appear and testify and furnish its views, principally on section 1 of S. 653. We do not formally appear and testify on the other sections, although personally both Magistrate Turner and myself are in accord with the principles and purposes and goals of the other sections of the bill.

We will submit our prepared statement for the record and will not read that into the record. I have a brief opening statement which I will make and then I will defer to Magistrate Turner from Norfolk, who has had some substantial experience in this area in the eastern district of Virginia.

Senator Thurmond, in introducing S. 653, commented that the change requiring a district judge to conduct an evidentiary hearing instead of a U.S. magistrate "recognizes the importance in our Federal system of State criminal justice proceedings by requiring the experience and authority of a Federal judge to overrule decisions of State supreme courts."

Senator Lawton Chiles, a cosponsor of that bill on March 10, observed: "In habeas cases we currently allow magistrates to make recommended findings of fact which can, in effect, overrule the decisions rendered by State trial judges and approved by State supreme courts." This morning in his testimony Senator Chiles again repeated that position.

As a preliminary matter we would like to make this response: Magistrates, in conducting the evidentiary hearing, thereafter do not make the final decision which may overrule a State supreme court. They hear the evidence, make the record, prepare proposed—and I want to underscore the word "proposed"—findings of fact, conclusions of law, and submit to a district judge a recommended disposition.

Thereafter that judge must review the magistrate's report de novo, afresh, anew, and make a totally independent decision. To the extent there are objections either by the petitioner—the prisoner—or the respondent—the State—or sua sponte, even on his own initiative, the district judge can conduct a further evidentiary hearing and may well do so where credibility issues may be critical or other factors indicate the judge should hear further evidence in the case.

Where a State attorney general or other counsel representing a respondent deems the magistrate's factual findings to be erroneous, it is a very simple matter to file objections and to request a district judge to hear the testimony which is critical to the fact determination and issue. Magistrate Paul Game, Jr., of the Middle District of Florida at Tampa, Fla., has advised me that of 129 petitions he screened in the past year, only 19 resulted in evidentiary hearings before him and none required any further hearings before a district judge. He further advised that in most cases the facts are not really in dispute and credibility is not even a close question. The ultimate disposition of the habeas petition turns on a question of law.

Magistrate M. Lewis Gwaltney of the Middle District of Alabama at Montgomery, Ala., advised that for the year ending June 30, 1981, for that 12-month period, he screened 84 habeas petitions, conducted evidentiary hearings in six cases, and that no further evidentiary hearings in these cases were necessary before the district judges.

In South Carolina, the magistrates for the 12-month period ending June 30, 1981 screened 87 State habeas corpus petitions and conducted evidentiary hearings in seven of these cases. Magistrate Charles W. Gambrell at Columbia, S.C., has advised me that these petitions are most frequently pro se, and an evidentiary hearing may be very time consuming. He recently presided at one which took 3 days.

We submit that the magistrate's role in conducting the evidentiary hearing has not really been the source of any problems in this area of the law and in State-Federal relations. Indeed, the magistrate's role in many districts—for example, in South Carolina—has resulted in facilitating and expediting the disposition of these petitions.

Thus, we do not think that a factual case has been made for precluding magistrates from conducting evidentiary hearings where, upon an adequate showing by a State attorney general or other counsel representing a respondent, a further additional evidentiary hearing may be conducted before the district judge, especially where the district judge is sensitive to the issues of State-Federal relations and the need for finality of criminal convictions. The ultimate responsibility for overturning a State criminal conviction, when that does occur, rests exclusively upon the U.S. district judge who enters the order.

I further wish to note that based on statistics furnished to us by the Administrative Office of the United States Courts, it does appear that Florida is the leading State in utilizing U.S. magistrates to conduct screening of State habeas corpus petitions and conduct evidentiary hearings. In the 12-month period ending June 30, 1981, in the Northern District of Florida, magistrates screened 69 such petitions and conducted five evidentiary hearings. In the middle district, Magistrate Gaines' district, at Tampa, Fla., they screened 312 State habeas petitions and conducted evidentiary hearings in 28 cases. In the Southern District of Florida, in Miami, 193 such petitions were screened by magistrates—reviewed by them—they conducted nine evidentiary hearings.

From my conversations with the magistrates involved in Florida, there does not appear to have been a problem with the magistrates conducting the evidentiary hearings. There may be a problem with the law in the ultimate rulings that the district judges may have rendered, and for that reason we suggest that before this subcommittee concludes its decision on this legislation, it may be well to hear from some of the district judges in Florida and in Alabama as to the role that the magistrates have played in rendering substantial judicial assistance in compiling the evidentiary record on which these cases must be decided.

I next defer to my associate, Magistrate Turner from Norfolk, for further comments.

STATEMENT OF JAMES T. TURNER, MAGISTRATE, EASTERN DISTRICT OF VIRGINIA, NORFOLK, VA.

Mr. TURNER. Thank you.

Good morning, Mr. Chairman. Before my summary of points that are set forth in our written statement, I would like to take just a minute to outline for you just who and what Federal magistrates are.

Magistrates are judicial officers of the Federal district courts. Currently there are about 210 full-time Federal magistrates. There are in addition a number of part-time magistrates, but section 1 of this bill concerning evidentiary hearings in habeas cases and others which I will get into primarily affect these 210 full-time magistrates.

The Federal magistrate system was created by a 1968 act of Congress which was designed to provide additional assistance for overburdened and backlogged Federal trial courts. Although this system has been fully implemented for less than 11 years, approximately 13 Federal magistrates have become Federal district judges; 1 Federal magistrate has become a Federal circuit judge—that being Judge Hatchett on the Fifth Circuit Court of Appeals; 2 Federal magistrates have become State supreme court judges; and 1 current full-time magistrate is a former law school dean. The chairman of the Judicial Administration Division of the American Bar Association, whose term just recently ended, is a Federal magistrate.

Magistrates routinely handle a full range of judicial duties in the district courts, including hearing every kind of pretrial motion and conducting trials of a full range of civil cases and nonfelony criminal cases. As a result of the 1979 amendments to the Magistrates Act, magistrates must have been for at least 5 years members of the highest court of the State; they must have been in the active practice of law for at least 5 years; and I might say typically those who are actually selected far exceed that. Those are minimum requirements.

Magistrates must now be selected by a public merit selection commission, which includes both laypeople as well as lawyers, and the district judge that appoints a magistrate must select that person from a list submitted by this public merit selection panel.

I think all of this illustrates that if Congress intended to create a system of judicial officers to assist district judges in conducting the business of the Federal trial courts, they have succeeded immensely and ought to be proud of their accomplishment. In our view, enactment of section 1 of this bill would detract from that success.

You have our written and complete statement. At this point I would just like to summarize the main points we try to make in the statement.

The bill has three sections, as everyone has mentioned, and our comments as representatives of the National Council of Magistrates are directed only to section 1 of the bill. Now the effect of section 1 of this bill on the jurisdiction of magistrates is far broader than the title of this bill implies.

The title of this bill would suggest, and the testimony of everyone who has been here so far would suggest, that insofar as it affects the jurisdiction of magistrates it affects only conducting evidentiary hearings in State prisoner habeas corpus cases; not so. Section 1 of this bill as it is presently written would also eliminate the jurisdiction of magistrates to conduct evidentiary hearings in section 1983 prisoner condition-of-confinement cases brought not only by State prisoners but by Federal prisoners as well. If brought by a Federal prisoner it would be under another section but it would still be a condition-of-confinement case that magistrates are now conducting substantial numbers of evidentiary hearings in but could not if section 1 of this bill were enacted.

The first point we would like to make is that there does not appear to be any good reason for enactment of section 1 of this bill. Presumably, proponents of a measure that would reduce the current jurisdiction of magistrates which is being utilized by the Federal trial judges would have the burden of showing that such a change is necessary or desirable. We suggest to you that is an impossible burden. We further suggest that enactment of section 1 would detract from the current quality and efficiency of justice in the Federal trial courts and increase backlog.

Enactment of section 1 of the bill would be inconsistent with a 10-year trend in extending civil jurisdiction to magistrates. It is not as though Congress created a system of magistrates and gave them extremely broad civil jurisdiction and now is wondering if they granted too much jurisdiction. With the 1968 Magistrates Act, the civil jurisdiction of magistrates was rather extremely limited. It did not provide in terms for the right to conduct evidentiary hearings in prisoner condition-of-confinement cases, habeas corpus cases, or other matters.

A 1974 Supreme Court case which is cited in our formal statement reversed a habeas corpus decision in which a magistrate had conducted an evidentiary hearing. It was in no sense a constitutional case; it was purely one of statutory interpretation, the Supreme Court deciding that Congress had not intended for Federal magistrates to have the jurisdiction to conduct these evidentiary hearings.

Justice Burger, in his dissent, invited Congress to make it plain if they meant for magistrates to have that jurisdiction and Congress quickly did so. A substantial portion, a really significant portion of the 1976 amendments to the Magistrates Act was an amendment to specifically grant the power to magistrates, upon assignment by the district judge, to conduct these evidentiary hearings in both State as well as Federal habeas corpus cases and in all sorts of condition-of-confinement cases brought by prisoners.

In addition, in 1979 Congress went far beyond that jurisdictional grant for magistrates to conduct evidentiary hearings. The 1979 act granted power to magistrates to conduct a full-blown trial and enter final judgment in every civil case, in any kind of civil case, so long as the parties consented to the jurisdiction of magistrates.

Our second major point in urging you to delete section 1 from the bill is that any tinkering with the jurisdiction of magistrates would be inappropriate at this particular time. Another part of the 1979 act directed the Judicial Conference to conduct a 2-year study of all phases of the magistrate system, including jurisdiction, and report on how it is working and what changes if any should be made. That report has been 2 years in the works; it is due to be filed next month. At this stage to tinker with one element of jurisdiction out of the context of that whole study would seem to constitute a large waste of Judicial Conference time as far as jurisdiction is concerned. It is simply a matter of bad policy.

Enactment of section 1 would increase the work load of district judges at a time when those judges are not only backlogged and overworked but that workload is increasing. We cited in our cover letter some statistics from the year which just ended June 30 last. In that year, the filings in civil court cases increased 7 percent; in criminal cases they increased 8.2 percent, these being percentages over the year which ended June 30, 1980. In the civil field that meant that per district judgeship there were 350 civil case filings. Of course, that is on top of whatever workload that district judge had when that particular statistical year began.

Enactment of section 1 would limit the flexibility of assignments within the district court. At present, a magistrate can hear literally any civil matter within the district court so long as it is assigned to him by a district judge and, where it is required, the parties consent. To enact section 1 of this bill would be to back off on one element of that civil jurisdiction and consequently limit the flexibility of the district judge to assign matters where he needs the assistance.

Finally, enactment of section 1 of the bill we very strongly feel would have an adverse impact on the kind of people that are drawn into the magistrate system. As I mentioned, the current civil jurisdiction of magistrates upon assignment by a district judge and where required, with consent, is coextensive with the civil jurisdiction of the district judges. We feel that it is simply axiomatic that the broader the jurisdiction of the office, the higher the caliber of person you are going to draw into it. If you now begin to back off on that jurisdiction, to limit it in some respect, it simply makes the office less attractive to the most qualified members of the bar.

For all these reasons and the reasons in our formal written statement, we would urge that section 1 of the bill be deleted.

I would be delighted to try to answer your questions.

Senator **Heflin**. Let me ask you, then—of course each of you are magistrates—how many have you handled, for example, how many petitions did you handle last year, Judge Burnett, dealing with the——

Mr. **Burnett**. In the District of Columbia we have a rather unique situation, and that is that Congress in the court reorganization bill for creation of the superior court enacted a provision which is comparable to the postconviction procedures in 2255 for the Federal courts, which requires that a person convicted in the D.C. Superior Court must go back through that court and go all the way to the Supreme Court.

A Supreme Court decision, *Swain* v. *Superintendent,* or *Reformatory Superintendent* v. *Pressley* in 1977, said that the Federal district court did not have jurisdiction to consider State habeas corpus petitions in the Federal court. Now prior to that time we used to screen them but because of *Wedding* v. *Wingo,* we did not conduct the evidentiary hearing. Therefore, this is not as much of a problem in the District of Columbia as it is with reference to the Federal courts and the relationship of the Federal courts to the State courts in the various States. Therefore, we have a very limited——

Senator **Heflin**. In other words, what you are telling me, you have had a pilot program here in the District of Columbia——

Mr. **Burnett** [continuing]. Kind of a pilot program for the State——

Senator **Heflin** [continuing]. Which is similar to the bill we have right here.

Mr. **Burnett** [continuing]. For the State to handle its own cases, basically, and through the State-type system. That is correct.

Senator **Heflin**. However, there is still a procedure by which it can come to the Federal district court, or is there a finality in your——

Mr. **Burnett**. Well, the rare or exceptional case can still come to the Federal court where a person belatedly raises a constitutional issue which could not be raised in the post conviction procedure in the superior court, so there is that——

Senator **Heflin**. Could not have been raised?

Mr. **Burnett**. Which was not raised or could not have been raised previously in the superior court system.

Senator **Heflin**. Have you read this bill that is proposed?

Mr. **Burnett**. Yes, I have.

Senator **Heflin**. Does it differ much from what you all have adopted here in the District court?

Mr. **Burnett**. I really do not think so. I think substantively it is pretty much the same basic system.

Senator **Heflin**. Has it worked pretty well?

Mr. **Burnett**. I think it has worked very well so far as the Federal court workload in this area is concerned.

Senator **Heflin**. Well, how do you think it works in regard to the protection of the constitutional rights of the accused?

Mr. **Burnett**. I think it also works very effectively there, and the superior court judges and the D.C. Court of Appeals judges who are comparable to your State supreme court justices have been able to effectively protect the constitutional rights of defendants.

Senator **Heflin**. All right.

Judge Turner, in regard to your situation in Virginia do you have a similar situation, where after a conviction has been affirmed by the highest court and they have exhausted the Supreme Court remedy, do you have a petition by which they go through a procedure in the State court before they can go into the Federal district court?

Mr. **Turner**. Yes, sir. There is a system of State habeas corpus which sort of parallels the Federal habeas corpus, except in the Virginia State system it can be used only to attack a jurisdictional basis of the courts or matters which just simply could not have been raised at trial or on appeal, ineffective assistance of counsel, or denial of right to appeal.

Senator **Heflin**. I think most States have similar situations.

Mr. **Turner**. Yes. Virginia does not have an intermediate court of appeals for either civil or criminal cases. It goes from the trial court directly——

Senator **Heflin**. The Supreme Court of Virginia has the criminal——

Mr. **Turner**. Yes, sir.

Senator **Heflin**. It is a little different. It is not really an appeal right there, it is an appeal by discretion, and Virginia is one of the rare States that have that.

Let's see: After it comes to you, after it has gone to through all of the State remedies, if you were to have an evidentiary hearing in the U.S. district court which would be conducted before you as a magistrate——

Mr. **Turner**. Right.

Senator **Heflin** [continuing]. You make the hearing, then you make your findings of fact and your recommendations to the district court judge.

Mr. **Turner**. Right, sir.

Senator **Heflin**. Then the district court judge will review it.

Mr. **Turner**. Right, sir.

Senator **Heflin**. Is there any presumption in favor of your findings of facts?

Mr. **Turner**. Senator Heflin, certainly there is no legal presumption. To be perfectly candid with you, I think when district judges have worked with a particular magistrate—and I have a splendid working relationship with the district judges in the Eastern District of Virginia—and they have had occasion to review your work from time to time and know it is good, I think to be very candid there may be in their minds a presumption that what the magistrate has done is probably right, but I can assure you that that is not the end of it.

In 2½ years I have had occasion in the habeas area to conduct only two hearings, and I handle all of the habeas work in the Norfolk and Newport News divisions in the Eastern District of Virginia. In one of those two hearings, the Federal district judge to whom the findings were submitted reversed me, so it is not in any sense a rubberstamp operation.

Senator **Heflin**. In other words, you go through the hearings—I am looking at judicial manpower and opportunities for the protection of constitutional rights—you go through it, you make your findings of fact, in other words, you make your recommendations as to the applicability of the facts to the law, to the protections.

Mr. **Turner**. Right, sir.

Senator **Heflin**. Then your Federal district court judge reviews that, which is really a second review.

Mr. **Turner**. Right, sir.

Senator **Heflin**. Then if the person, the accused—really he is already convicted—disagrees, he can file a petition for rehearing in your Federal court and have a hearing on that. Then he has the right under appeal to go to the circuit court of appeals, and in that circuit court of appeals he would have a right before a panel of judges, generally three, that would consider the appeal there.

He would then have a right to file an application of rehearing before those three judges. If there are certain circumstances, he could have an en banc hearing of all of the judges of that circuit, which would be another one, and then he would have a right to go to the U.S. Supreme Court.

Now looking at that, that is one, two, three, four, five, six, seven that he has there. Now if he then comes back and raises another issue or raises the issue that this counsel was incompetent, he can go through the same steps again, or does he then have to go back through the State court?

Mr. **Turner**. Two things probably prevent him going through the Federal process again. No. 1, there is a rule, rule 9 of the rules governing so-called section 2254 cases in the U.S. district courts, which prohibits successive petitions. Rule 9(b) would prevent a successive petition which is defined either as the same issue previously ruled on on the merits or one which should have been raised at that time, such that to raise it now would be an abuse of the writ, so he has that battle.

On a specific issue you raised, that of incompetent counsel in the habeas hearing, as I understand the current state of the case law incompetence of counsel on a habeas case or a habeas proceeding would not be grounds for Federal habeas relief. The only effective assistance that the criminal defendant has a right to is at the trial and on his appeal, if the State provides an appeal.

Senator **Heflin**. In other words, if you are in Federal court you cannot have incompetent counsel but if you are in State court you have an incompetent counsel. [Laughter.]

Mr. **Turner**. If you had a criminal trial——

Senator **Heflin**. Is that the basis of the status of the law today, that in the State court it is possible to have incompetent counsel but in Federal court it is impossible to have incompetent counsel?

Mr. **Turner**. No, sir. You probably have the same lawyer both places. It is simply that you have a sixth-amendment right to effective assistance of counsel only in your State court criminal trial. You do not in a State or Federal civil trial. Habeas cases are civil cases and you do not have that sixth-amendment right in civil cases.

Senator **Heflin**. Well, assuming the procedure we pointed out with Chief Justice Torbert for 17 hearings, and then we have 7 that we would go through, that is 24 hearings that a person would have the right to. That does not then preclude him from—there are still avenues that he can continue to go back into the State court and raise an entirely different issue.

Mr. **Turner**. He is free to go back to the State court if they will hear him.

Senator **Heflin**. With some limitation but not with absolute certainty, he can still come back into Federal court and it is possible for him to go through that same procedure again on a legitimate point.

Mr. TURNER. Is is certainly possible. It certainly has happened. Rule 9 would ordinarily preclude it.

Senator HEFLIN. I believe that is all.

Do you have any questions?

Mr. MANSON. I had several.

What percentage of the de novo reviews reach a conclusion that are contrary to the decision of the magistrate? Do you have any idea nationwide?

Mr. TURNER. I really do not have any nationwide statistics on that. I could tell you my own experience. It is very small. I have been handling in the 2½ years since I have been a magistrate, as I mentioned, all of the habeas work. I have been reversed that 1 time in 250 matters but that 1 time was the 1 time I recommended that the petition be granted. The district judge reversed it.

Mr. MANSON. I guess I would be curious as to how that figure might compare with the percentage of findings that are overturned as opposed to the ones that are overturned on de novo review.

Mr. TURNER. I am not sure I understand the question.

Mr. MANSON. Well, are all appeals taken from magistrates' decisions? I mean, there is more than one route for appealing those decisions, as I understand it. Is that correct?

Mr. TURNER. No, sir.

Mr. MANSON. Are all reviews on a de novo basis?

Mr. TURNER. Right.

Mr. BURNETT. As to habeas corpus matters?

Mr. TURNER. Yes, as to habeas corpus and in any dispositive matter, any dispositive civil matter there is a de novo review to the Federal district judge.

Mr. BURNETT. Only when the magistrate acts by consent and it is a civil matter that it goes to a district court judge. Then it would be an appellate standard or, in several cases which we have tried, the current 1979 act provides for a direct appeal to the court of appeals. However, that is in a civil case where the parties have consented to the magistrate's jurisdiction.

Mr. MANSON. I understand that roughly one out of seven petitions filed in Federal courts are habeas petitions, so I guess we are talking a relatively substantial number there. I believe also in the State of Virginia there are 1,200 habeas cases that are handled by the attorney general's office in that State. I was just wondering what percentage of these habeas cases that are raised on the State level find their way into the Federal system, say, in the State of Virginia.

Mr. TURNER. There again I do not even know that such statistics have been kept but if I had to guess, I would say virtually every one. In fact, there is the current requirement to exhaust State court remedies before you even have Federal jurisdiction.

Mr. MANSON. Which is not true under 1983, as I understand it.

Mr. TURNER. It surely is not. The real burden in the Eastern District of Virginia is with the 1983 cases, another reason for deletion of section 1. Currently I am conducting all of the 1983 evidentiary hearings. If all of that were thrown back on the district judges it would be unfortunate.

Senator **Heflin**. Thank you, gentlemen. We appreciate it.

[The prepared statement of Messrs. Turner and Burnett follows:]

PREPARED STATEMENT OF JAMES T. TURNER AND ARTHUR L. BURNETT

S.653 is a bill to amend Title 28 U.S.C. to modify habeas corpus procedures affecting state prisoners. The bill would also affect procedures in condition-of-confinement cases filed by both state and federal prisoners.

S.653 contains three sections. Section 1 deals with the jurisdiction of United States magistrates to conduct evidentiary hearings in state prisoner habeas corpus proceedings. In addition, by eliminating language in 28 U.S.C. Sec. 636(b)(1)(B) granting authority to magistrates to conduct hearings concerning "prisoner petitions challenging conditions of confinement," this bill would eliminate the authority of magistrates to conduct evidentiary hearings in both state and federal prisoner condition-of-confinement proceedings. Our statement is addressed only to the provisions of Section 1 of the bill pertaining to magistrates' jurisdiction.

Sections 2 and 3 of the bill would amend 28 U.S.C. Sec. 2244 and Sec. 2254(d) in ways which would reduce the number of state prisoner habeas corpus petitions handled by the federal courts. We do not, in this statement, take any position with respect to Sections 2 and 3 of the bill.

It is important to note that Section 1 of the bill is entirely separable from Sections 2 and 3; if Section 1 were deleted from the bill, Sections 2 and 3 could stand alone as amendments affecting federal court treatment of state prisoner habeas corpus petitions.

Section 1 would eliminate the jurisdiction of United States magistrates to conduct evidentiary hearings in state prisoner habeas corpus matters and would also revoke jurisdiction to conduct evidentiary hearings in prisoner condition-of-confinement cases initiated by both state and federal prisoners. In this respect, the bill is significantly broader than its title implies.

We are opposed to the Section 1 provisions which would reduce and restrict the existing civil jurisdiction of magistrates for several reasons.

A reduction of magistrates' jurisdiction would be an unfortunate and perhaps even disasterous reversal of a strong trend in the opposite direction. Under the Federal Magistrates Act of 1968, which created the magistrates system, magistrates had authority to conduct preliminary reviews of prisoner petitions and to make reports and recommendations concerning whether there should be a hearing. Shortly after the Act was implemented, magistrates in some district courts were used by federal district judges to conduct evidentiary hearings in habeas corpus cases, a practice which was a boon to the expeditious handling and disposition of such matters. This practice was struck down by the Supreme Court in Wingo v. Wedding, 418 U.S. 461 (1974). The Court considered its decision simply as one construing the statute and decided that Congress had not intended to authorize magistrates to conduct civil evidentiary hearings. Congress promptly responded with the first major amendment to the Federal Magistrates Act in 1976 (P.L. 94-577, October 21, 1976) specifically authorizing magistrates to conduct such hearings and to recommend final disposition. Thus, after the 1976 amendments to the Federal Magistrates Act, magistrates were expressly empowered to conduct all phases of prisoner petition cases except entry of case dispositive orders (which can be entered only by district judges).

As part of the 1979 amendments to the Federal Magistrates Act (P.L. 96-82, October 10, 1979) Congress expanded the trial jurisdiction of magistrates to include any and all civil cases, whether jury or non-jury and regardless of the subject matter or amount in controversy, so long as the parties consent to the magistrate's jurisdiction. Thus, as of October 1979, with the consent of the parties, the available jurisdiction of magistrates in civil cases has been literally and precisely the same as that of United States district judges.

From the foregoing, it is clear that since the implementation of the 1968 Act which created the magistrates system, the trend of Congress has been to amend the initial enabling act to increase and expand the civil jurisdiction of magistrates to the point where it is now as broad as constitutionally permissible, and the district courts have consistently used this authority. Section 1 of the bill would not only reverse this desirable trend, it would have the practical effect of repealing the most significant provisions of the 1976 amendments to Magistrates Act. If Section 1 were enacted, the only evidentiary hearings which magistrates could conduct in litigation initiated by prisoner petitions would be that in federal prisoner habeas corpus cases under 28 U.S.C. Sec. 2255, an area where magistrate involvement has traditionally been extremely light because the cases are routinely assigned to the district judge who conducted the federal prisoner's trial and who would thus be familiar with the background of the federal prisoner's claims. Consequently, even though magistrates' jurisdiction to conduct evidentiary hearings in this narrow area of prisoner petitions would remain, in the context of current and efficient case assignment practices, the jurisdiction of magistrates to conduct evidentiary hearings in prisoner petition litigation would be virtually eliminated.

An appreciation of the impact that elimination of this jurisdiction would have on the workload of district judges can be gained from an examination of statistics for the preceding three years. Evidentiary hearings conducted by magistrates over the three years preceding June 30, 1981 which would have been prohibited had Section 1 been in effect are as follows:

YEAR ENDING	STATE HABEAS	CIVIL RIGHTS
June 30, 1979	198	220
June 30, 1980	212	403
June 30, 1981	243	401

To place these figures concerning hearings in the prisoner petition context, the following figures demonstrate the total number of prisoner petition matters disposed of by magistrates for the three years preceding June 30, 1981, including those in which hearings were conducted:

YEAR ENDING	STATE HABEAS	FEDERAL HABEAS	CIVIL RIGHTS
June 30, 1979	4,512	1,978	5,572
June 30, 1980	4,334	1,736	5,508
June 30, 1981	5,513	1,854	7,450

These statistics illustrate the significant assistance which magistrates have rendered to district judges (a total of 1,677 evidentiary hearings during the three years preceding June 30, 1981) and demonstrate the burden which would be imposed upon district judges should Section 1 be enacted. The existing jurisdiction frees the time of district judges for conducting trials in felony cases in order to comply with the deadlines of the Speedy Trial Act, for conducting hearings and trials in civil cases requiring priority treatment under various Acts of Congress, such as Title VII, Freedom of Information Act, and Privacy Act, and for conducting other cases requiring priority such as those challenging regulations of government agencies or requesting injunctive or other expedited relief, and otherwise contributes to reducing and preventing substantial civil and criminal case backlog.

These statistics further illustrate that enactment of Section 1 would contribute to inefficiency and delay. When the judicial officer who conducts an evidentiary hearing is the same one who has handled all other judicial aspects of the matter, including determination (for the purpose of recommendation) that an evidentiary hearing is indeed necessary, duplication is avoided. On the other hand, when the judicial officer who conducts the evidentiary hearing is not the same one who has been previously immersed in the case, some efficiency in use of scarce judicial resources is lost.

A provision of the Federal Magistrate Act of 1979 required the United States Judicial Conference to undertake a study of the magistrates system in accordance with recommendations of the Judiciary Committees of both houses of Congress.

One of the inquiries directed to the Judicial Conference concerns the jurisdiction of magistrates and whether it is appropriate in its present form. That report, two years in the making, is scheduled to be filed with Congress in December, and presumably could lead to hearings concerning jurisdiction as well as other major aspects of the magistrates system in the Spring of 1982. It would be most inappropriate, in view of this status, to tamper with one aspect of the jurisdiction out of the context of the Congressionally directed study.

Congress has established magistrates as judicial officers of the district courts with authority to handle any and all aspects of all civil cases provided that the prerequisites of consent and assignment are met. Carving out a major specific catagory of cases would unduly limit the flexibility that has been a major reason for the success of the system. The district courts would be left with a situation in which a magistrate could conduct trial and enter judgment in the most complex anti-trust, securities or employment discrimination litigation but could not conduct the evidentiary hearing in a habeas corpus case or a prisoner condition-of-confinement case.

Enactment of Section 1 of the bill would, of course, mean that district judges would thereafter be required to conduct the evidentiary hearings. This does violence to the whole purpose of the Federal Magistrates Act which is to permit magistrates to be of maximum assistance to district judges and thereby prevent backlog and increase access to the courts by all segments of the public.

The Judicial Conference of the United States, at its September 1981 meeting, adopted a resolution opposing Section 1 of this bill. The Conference adopted the view that any such selective restriction on the civil jurisdiction of magistrates should be rejected as a matter of basic policy.

A continuing concern of the National Council of United States Magistrates and of magistrates generally is with attracting and retaining lawyers of the highest caliber. It is axiomatic that the broader the jurisdiction of the office, the higher the caliber of practitioner who will be attracted to it. The fact that under current law magistrates have jurisdiction in civil matters co-extensive with that of district judges (upon assignment and, where required, with consent of the parties) is a major factor in attracting and retaining the same caliber of persons who would be interested in and considered for district judgeships. A significant shrinking of this jurisdiction would make the position less appealing to some degree to the kind of practitioner that Congress undoubtedly hopes to attract.

Based on all of the foregoing, we strongly urge that Section 1 of the bill be deleted.

Senator HEFLIN. We now call the panel consisting of Prof. Stephen Gillers, associate professor of law, New York University, New York, on behalf of the American Civil Liberties Union; Mr. Richard J. Wilson, director, Defender Division, National Legal Aid & Defender Association, Washington, D.C.; and Mr. Robert L. Harris, past president of the National Bar Association, Washington, D.C.

We are delighted to have you with us. Your written statements will be put in the record in full, and if you will we would appreciate your summarizing them.

STATEMENT OF STEPHEN GILLERS, ASSOCIATE PROFESSOR OF LAW, NEW YORK UNIVERSITY

Mr. GILLERS. Thank you, Senator.

I am professor at NYU law school and I am speaking here on behalf of the American Civil Liberties Union. I thank you for this opportunity to present our views.

The statements I heard this morning, Senator Heflin, were very informative. I sympathize, as I say in my statement, with the concern for finality and with the interest of the State judiciary in avoiding sandbagging and in protecting their valid procedural rules in criminal trials.

Nevertheless, the American Civil Liberties Union opposes this bill. But it does not oppose it primarily for constitutional reasons and it does not oppose it because we feel that its policy concerns are misguided, although we might balance those concerns differently in particular cases. Rather, Senator, we oppose the bill because we believe it is unnecessary as a matter of fact, unwise as a matter of law, and could lead to great injustice in certain kinds of cases, as I believe Mr. Rose this morning also recognized.

BROWN VERSUS ALLEN

Senator, the debate that we are engaged in today was commenced nearly 30 years ago between Justices Frankfurter and Jackson in *Brown* v. *Allen,* the first major case of the modern era of habeas corpus jurisdiction. Justice Jackson, in a very cogent image, said that "he who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."

He was concerned about the increasing number of meritless State habeas petitions filed when measured against the very small number of meritful State habeas petitions. Justice Frankfurter in the same opinion warned, however, against "rigid rules which by avoiding some abuses generate others." Really, Senator Heflin, what we are trying to do here today is to find the right mix, if you will, the mix that will exclude the "haystack" without excluding the "needles."

"FLOODING" THE COURTS

Now, Senator, you have heard and I have heard a great deal, and U.S. Attorney General William French Smith has testified before Congress, about how State habeas petitions are flooding the Federal court. This is not true. The facts point otherwise. If you take all Federal cases, civil and criminal, the number of State habeas petitions filed in the Federal court in the year ending June 1980, according to the Administrative Office of the United States Courts, was 3.5 percent of the total filings, and if you limit your base to civil cases only it was only 4.1 percent.

Not all cases are the same. Obviously it is misleading to call an antitrust case that may go on for 3 years and require a 6-month trial, one case, when you also call a case that is disposed of on summary judgment after 3 or 4 months, say a contract case, one case. They make different demands on the court and so you must weigh in some intelligent way the demands that the particular case is making on the respondent and on the court system.

It is instructive therefore, I think, that nearly 97 percent of all State habeas filings are dismissed before pretrial, and that only 2 percent actually are terminated with a hearing. In the year ending June 1980, that amounted to 133 cases, nearly all of them to a judge rather than to a jury, thereby reducing yet again the demands on the Federal court system.

Furthermore, one has to ask how long the trial takes. Of the approximately 200 State habeas corpus trials held in the year I am speaking of, 194 lasted a day or less. By comparison, some 4,000 civil trials lasted 4 days or longer in the Federal court system in that year.

LIMITS OF LANGUAGE

Now if we were all geniuses, we would think of a way to write a rule that would exclude the bad cases, the cases that are going to wind up being rejected anyway, the meritless ones as it turns out, while allowing in and allowing to go to decision the good cases, the "needles." We would exclude the "hay" and include the "needles."

However, the English language and human predictability are simply not sufficiently advanced to create that kind of exact definition. It is not possible. We can make efforts but we have to realize that our efforts are rough at best. We must also realize that there are going to be "needles" in any batch of habeas cases; that is, petitioners that deserve Federal attention, petitions from persons who were wrongfully convicted and possibly innocent persons who were wrongfully convicted. We do not want through rules that exclude the "hay" to exclude those meritorious petitions as well.

PROCEDURAL DEFAULTS ONLY

Senator, there has been a lot of talk—and you have presented me with a very clear description of the court system in Alabama, one that I did not have before coming here today—about the many remedies, the many opportunities a State prisoner or a State defendant has to raise his or her Federal constitutional claims. However, we should be very clear about one thing: S. 653 would not directly involve or affect most State habeas cases.

The reason is that it does not attempt to undermine or change the rule in *Brown* v. *Allen.* That rule, handed down in 1953, said even if the prisoner, the defendant, has had a chance to raise the Federal claim in State court, and whether or not he has sought certiorari in the Supreme Court, so long as he has raised it in State court, has given the State court a chance to consider it, he may seek relief on that same claim in a collateral attack in Federal court after exhausting any collateral State remedies.

So long as there has not been a procedural default in State court, despite this proposed law, the State prisoner would be entitled to continue to have a Federal review of the Federal law question. This bill would not affect that at all.

Now we do not know—I do not know and I do not believe the Administrative Office of the U.S. Courts knows—how many of those 7,000 claims or 133 trials would be totally unaffected by this bill. I think that is something we ought to be aware of when we talk about "stopping the flood" if indeed there is a flood at all.

Now I would like to concentrate on the cases this bill does affect, namely those cases in which there has been a procedural default in the State court, that is, the defendant in State court did not object to a particular act by the prosecutor or a procedure in the State system, and now seeks to raise it is an issue collaterally in Federal court.

WAINWRIGHT VERSUS SYKES

Justice Rehnquist, in *Wainwright* v. *Sykes* only 4 years ago, Senator Heflin, said that that prisoner will not be allowed to raise the issue unless he can show actual prejudice and cause. Justice Rehnquist refused to define those terms, saying that those terms would give Federal judges an opportunity to correct serious miscarriages of justice and did not need further definition except on a common law, case-by-case basis. Justice Stevens, concurring, said the Court "wisely refrained" from defining those terms, "cause" and "prejudice," from freezing them to a particular meaning. Given the limits on human predictability and on the preciseness of language, he was correct.

This bill would ignore that lesson, which took 28 years, since *Brown* v. *Allen,* in coming to the Supreme Court. This bill would leave the definition of prejudice to a case law definition, but would define with only four possible meanings the word "cause." Those four meanings, as Mr. Rose this morning recognized, are not nearly enough to correct for the injustices, to help find and consider the "needles."

Now I think Justice Rehnquist and Justice Stevens and the court in *Wainwright* are right, in that the definition of cause as well as the definition of prejudice ought to go along on a case-by-case basis. I think that this committee and the Senate can have full confidence in the Supreme Court in being careful not to loosely define those ways, those words.

SUPREME COURT AWARENESS

The Supreme Court has, it seems to me, shown a great sensitivity to the problems you and your committee are concerned with. It has decided *Stone* v. *Powell,* which excludes challenges to illegally seized evidence from being raised in Federal court after once fairly raised in State court. Just last term, Senator Heflin, it decided *Sumner* v. *Mata.*

That was a case in which the ninth circuit found that a State prisoner had been convicted as a result of an impermissibly suggestive eyewitness identification. The ninth circuit in that case disagreed with a contrary, mixed fact and law conclusion of an intermediate appellate court in California. The Supreme Court sent the case back and said to the ninth circuit; You have to abide by 2254(d) and you have to presume that the intermediate appellate court's conclusion on this mixed fact and law issue is correct unless convincing—not merely a preponderance—but convincing evidence indicates otherwise.

The case was sent back. I think that case as well as *Wainwright* shows that the Supreme Court is quite attentive to the problems that a flood of State habeas petitions—if it does come or could come would present to the lower Federal court.

THE SNEED CASE

One other point with regard to what Justice Torbert spoke about this morning: In relating the Supreme Court's refusal to grant certiorari in the *Sneed* case earlier this month, Justice Torbert saw it as an example of an abuse of the writ. That is not an abuse of the writ. What he was complaining about, rightly or wrongly—and I am not speaking to whether or not the dissent from the denial to grant certiorari was correct—what he was complaining about was the substantive rule. He did not like the fact that the fifth circuit applied a different constitutional rule than his court did.

I understand that. Nobody likes to be second-guessed. It was not the remedy that troubled Justice Torbert; it was the fact that the substantive rule as applied by the fifth circuit, without review in the Supreme Court, differed from the rule imposed by the Alabama Supreme Court.

CONCLUSION

It is wrong and it is especially wrong and dangerous in this area where, as the Supreme Court has learned, flexibility is necessary, to use a jurisdictional statute, to prohibit—no matter what may happen, no matter what miscarriages of justice may come to pass—Supreme Court and lower Federal court collateral review.

Thank you very much.

STATEMENT OF RICHARD J. WILSON, DIRECTOR, DEFENDER DIVISION, NATIONAL LEGAL AID DEFENDER ASSOCIATION

Mr. **Wilson**. Senator Heflin, thank you very much for the invitation to appear today.

My name is Richard Wilson. I am with the National Legal Aid & Defender Association. I would like to adopt the remarks of Mr. Gillers as my own. He stated the case very aptly. I can only add to the statistical data that he gave. I believe my written statement updates the statistics for last year's filings, that is those cases filed on Federal habeas during the year ending June 1981.

Again, the experience is almost identical. In reviewing the experience in the Federal courts over the past 10 years, I think it is clear that in 1970 we reached a zenith in the number of filings of Federal habeas petitions in the Federal courts, and that that number has actually been in decline for the last 10 years. I think that is a significant fact when we examine the allegation of a "flood" of habeas petitions before our district judges and magistrates.

Expanding just for a moment even beyond that, not just to the number of cases which appear in the Federal courts annually but to the number of criminal convictions which occur in our system yearly, as my statement documents there are over 2.25 million convictions in courts of general jurisdiction in this country. I will accept the statement that was made earlier this morning that there are approximately 200,000 individuals in our penal system every year.

In all but 7,800 of those cases last year, the findings of the State courts, were final. They were final decisions which were left untouched by any Federal judge. Those 7,800 cases which did proceed into Federal court on habeas represented only 4 percent of the total filings and less than 1 percent of the total trials held in Federal court, if we equate an evidentiary hearing with a trial. Again, Mr. Gillers' statement with regard to the scope of those trials is very informative.

I think that fact is most interesting in two respects: It shows both that these cases do not consume an inordinate amount of time in the Federal court system and that, as compared with the 2.25 million convictions which occur in our system annually, there is an overwhelming deferral by Federal court judges and magistrates, and in fact by the defendants themselves, to the State court fact-finding process.

My experience in Illinois as an appellate defender with the State appellate defender office of Illinois for almost 8 years is a microcosm of what I believe has occurred in many other jurisdictions since the time statewide defender services have been provided.

During the existence of the office of the State appellate defender in Illinois there were or have been approximately 10,000 appeals filed. Of that number only 77 have been pursued on Federal habeas corpus.

Senator HEFLIN. If you could summarize it, we have a vote that I have to go to, to help save Legal Services Corporation. If you would hurry, therefore, I would like to go vote on that. There is a vote on right now but go ahead.

Mr. WILSON. With regard to your elucidation of the 17 steps in the review process, I think your statement is quite accurate and I think that describes a system that exists in many jurisdictions in the country. What I think you do not take into account in enumerating these steps is the fact that there is a funnel effect, which I have already articulated: The numbers decrease and the rules against the defendant increase.

This bill would do nothing to prevent the defendant from pursuing his case into Federal court except to prevent him from doing so after 3 years. As both Mr. Gillers and myself have demonstrated, it is the occasional abuse which requires the intervention of the Federal courts.

Thank you.

Senator HEFLIN. I am going to have to recess the hearing. I know Mr. Harris has come all the way from California and I want to hear him. We do have a vote on right now. I assume that there is no other vote that follows it; sometimes it does but I will return as quickly as I can. The subcommittee will stand in recess.

[A brief recess was taken.]

Senator HEFLIN. If we could continue on the hearing and complete it, we would appreciate it.

Go ahead, sir.

STATEMENT OF ROBERT L. HARRIS, PAST PRESIDENT, NATIONAL BAR ASSOCIATION

Mr. HARRIS. Mr. Chairman, members of the subcommittee, my name is Robert Harris. I am from San Francisco. I am a former president of the National Bar Association. The National Bar Association welcomes this opportunity to let its views be known on S. 653.

We have submitted a written statement and I will not go over the points made in that statement. However, I would like to emphasize just briefly several things.

The first one, of course, is to reemphasize some of the testimony that was made earlier about eliminating the proviions which would deny a prisoner his right to challenge his conditions of confinement. We think that that is very important, for obvious reasons.

SECTIONS 2 AND 3 OF S. 653

Second, section 2 of the bill, a point which we did not emphasize in our testimony, does not recognize ineffective assistance of counsel as a grounds for raising the writ of habeas corpus. We think that is very important.

Third, section 3 of the bill is very troublesome. It is very troublesome for the reason that it would allow a conviction to stand under conditions where that conviction is very suspect and perhaps later could be shown not to have been obtained correctly.

For example, a person is convicted in State court, and the evidence was primarily based upon the confession of the defendant—let's assume it is a rape case—he confessed. There were six police officers who were there at the time that the confession was given.

One person, one of the police officers at trial testified on the record that the statement was given voluntarily, and the other five for whatever reason did not testify, and there is nothing in the record to indicate that they did not testfy.

Two or three years later or perhaps 4 or 5 years later, the other five give a sworn affidavit indicating that the prisoner was beaten unmercifully. They wanted to get that conviction. Now, under section 6, those affidavits could not be admitted. The reason: Because section 6 says that the record must conclude as a whole that there is no evidence to support the conviction, and of course the record would be replete with that testimony of that one officer indicating that the testimony was given voluntarily. Therefore, the prisoner would have to remain in jail for the balance of his term when it is clear that that should be subject to attack.

That type of situation should never occur in a system where the goal is to bring about fairness in those processes that are used to convict people. We do not think that S. 653 brings about that goal. We think that there is no showing that there is a mass abuse of habeas corpus or that the courts in fact are clogged with unwanted habeas corpus proceedings.

Based upon that, Mr. Chairman, the National Bar strongly urges this subcommittee to reject S. 653.

Thank you very much for this opportunity.

STATUTE OF LIMITATIONS

Senator **Heflin**. Nobody really addressed the statute of limitations much. Now as I understand it, the way this bill is drawn—I have not spent a lot of time going over it yet—there would be a statute of limitations, but the beginning period would be when the State court finality proceedings had been reached, in that you would then have a 3-year period in which to bring Federal habeas corpus proceedings.

I raised it but someone else said that if something occurred 30 years later that was such a gross miscarriage, I think that even if 30 years later those five policemen were to confess that the man perjured his testimony and it was based on perjured testimony, there ought to be a method of relief for him. I really believe that will establish that provision that you were worried about, no evidence. I think if we could pretty well establish it was perjured testimony then there probably would be an escape valve.

Most States do have—if something like that were to occur, it would be available, but is there argument as to whether or not it will be 3 years, 5 years, or some period of time? Are there arguments against some sort of statute of limitations for bringing of Federal habeas corpus after the State has exhausted all of its proceedings? There has to be some exception to take care of the rare case or where somebody 30 years later confesses, "I did the crime."

What are your feelings about some period of statute of limitations or whether there ought to be any statute of limitations?

Mr. **Gillers**. Senator, I could endorse and would endorse a proper limitations period. I think the one in the bill is not acceptable for several reasons. One is that it is measured from the time of finality in the State process. That will be after the final direct appeal is concluded but the statute, as it now exists, requires an exhaustion of State remedies, and that exhaustion might require the prisoner to invoke the State collateral process, be it coram novis or habeas corpus.

That process sometimes takes longer than 3 years, as it can in New York, not because the prisoner is dilatory but because there are motions, there are extensions of time, judges sit on opinions for a while, court reporters are late in bringing up transcripts. It seems to me unfair to say to a prisoner, "You must go to the Federal court within 3 years but you must also exhaust your remedy in State court," if that exhaustion will take close to or more than 3 years.

I would therefore measure the limitations period from the time that the prisoner exhausted all his State remedies.

Another problem with the limitations period as I now see it: There is no exception if, after 3 years, the prisoner learns of a prosecutorial transgression: The prosecutor has failed, for example, to turn over exculpatory evidence to the prisoner. Despite requests for such evidence and despite the prosecutor's Brady obligations, he has not turned that evidence over and this is not discovered for 4 years after the conclusion of the State proceeding. It seems to me that you would want to measure the time in that situation from the time of discovery.

As Mr. Rose said, because we are only human, it is not possible to foresee all the variations of problems that can arise. It would be unfair to exclude Federal habeas review with a fixed, unyielding 3-year rule. Nevertheless, I also understand the public's interest and the subcommittee's interest and the State's interest in some period of finality.

I think the solution is to put in a final subsection which would allow consideration after the limitations period if "for compelling reasons of justice" the Federal court, in its discretion, chooses to waive the period. Now I realize, as you said earlier, Senator, that everyone is going to come in and say, "I have a compelling reason of justice," and that is going to create a miniburden in and of itself. However, that is the situation we live with. Unless we are going to close the door all the way flat shut with a jurisdictional law, and not create any categories of exception at all, everyone who wants to get into Federal court is going to say, "Me, I am in the exception," and someone is going to have to sit down and go through those petitions and see if indeed that is true or not. There is simply no other way absent a rather harsh rule. I believe that an exception, such as the one I have just described, would result in a case law that would be very persuasive against filing of petitions after the period ran if they were not compelling.

Mr. **Wilson**. Senator, I am afraid I am not quite as sanguine as Mr. Gillers is about the potential for including a statute of limitations that, if I heard correctly, would not allow for exceptional cases, even if the time is measured from the date of completion of the appellate process in the State courts. I would agree that that process is very time-consuming, particularly in the most difficult cases such as those in which the death penalty is imposed.

Death penalty appeals present incredibly difficult problems in all respects, from preparation of the transcripts to decision of the appeal. They are frequently very long. They require and frequently even within the State court system, consume a great deal of time for review and the decision by the court of review at that level.

The fact of the matter is, I can recall a case of my own in Illinois in which this kind of specific, no-exception statute of limitations would have, in effect, barred a client of mine from seeking habeas corpus relief when that client, through no fault of his own, was represented by incompetent counsel; counsel who after he was appointed to represent the defendant on appeal, did nothing, sat with the case appointed for 5 years, never pursued the appeal. Finally the defendant wrote to our office saying, "I understood I had a right to an appeal. Can somebody help me?" That person would effectively be barred totally from pursuing his case into the Federal court, through no fault of his own. I believe that the rule 9 provisions——

Senator HEFLIN. He must have been incarcerated where there were no jailhouse lawyers.

Mr. WILSON. No, he was incarcerated where there were jailhouse lawyers. He is just a very quiet man.

I believe that the rule 9 provisions are enough to guarantee that there are not abuses in the subsequent petition situation or in the untimely pursuance of original petitions. In fact, not less that about 5 years ago the Congress itself struck out a specific 5-year, with prejudice time limit provision in rule 9 because of your fears that this kind of burden on the petitioner would be unfair.

Finally, I think your statement, Senator, that you agree that there has to be a case in which the rare exception gets into Federal court or gets some relief, is such that it would require that every case be pursued to find that rare case. It is the exceptional case that created the necessity for the rule.

One such case—and I will close with this—is the case cited by the attorneys general in support of their introduction of this rule. That is the case of *Walker* v. *Wainright.* I was curious about that case because it was cited as one of those examples of the abuse of the writ. My reading of that case is that Mr. Walker pursued a habeas corpus petition after being incarcerated for 35 years in Florida. He pursued his case into the Federal courts and the undisputed findings of fact in that case were that Mr. Walker spent 5 weeks in jail after his arrest, that he had no opportunity for consultation with a lawyer; that a lawyer was apppointed a few hours at most, said the opinion, before a life sentence was imposed; that there was no opportunity for a private conference between that defendant and his lawyer; and that, the guilty plea aside, there is no evidence of a confession or admission from that defendent. I believe that Mr. Walker is the reason the writ was created.

Thank you.

FINALITY OF JUDGMENT

Mr. **Harris.** Mr. Chairman, in the field of civil law I certainly have no problem with the concept of finality of judgment. I think it is very essential to the administration of justice in those situations and certainly in order to prevent stale claims, et cetera. However, when you are dealing with a person's liberty, with a person being locked up in jail, I have different considerations.

I have a difficult time imagining that there ought to be a statute of limitations upon due process, a statute of limitations upon when a person—a layman or whoever it is who happened to be in jail—can raise a claim, a legitimate claim, as we pointed out in our written testimony, about his illegal confinement. I suppose that if the statute were drafted correctly, so as to give some type of assurance that those who are in fact illegally incarcerated are always given the opportunity to litigate against their illegal detention, there may be some merit to it. However, certainly as this bill is proposed I think it is a detriment to prisoners who may be there illegally. Even if it would affect only one prisoner, I think that is a grave consideration that we have to be aware of in a democratic society.

Senator **Heflin.** If you would like to, you may file any sort of written response to these last questions.

I do not know what is going to happen, but there is a lot of movement to do away with the exclusionary rule. If you were to do away with the exclusionary rule, where would the postconviction habeas corpus proceedings be—one issue.

In the concept of the new criminal code, in order to provide some sort of appellate review of sentencing there are concepts, and one concept that was pushed before is that there be sentencing commissions and that there be very restricted areas and latitude with the trial judge as to the sentencing. Now that of course is strictly in the issue of the Federal courts, and were it to spread—the exclusionary rule could have State implications. Sentencing would have to be adopted basically by the State courts.

Those two issues are confronting Congress. There is considerable movement toward adoption of those. How would this proposed legislation deal with those two issues?

I am not asking you now because I do not have time to listen to all of your thoughts on this, but if you want to file something with that in mind I would be interested in reviewing it and seeming where it stands.

Thank you. We appreciate very much your being here.

[The prepared statements of Messrs. Gillers, Wilson, and Harris follow:]

PREPARED STATEMENT OF STEPHEN GILLERS

I. INTRODUCTION AND SUMMARY

I am a law professor at New York University School of Law and a member of the New York Bar. I have taught in the areas of constitutional law and federal jurisdiction and have written on criminal law matters. I am testifying here today on behalf of the American Civil Liberties Union.

S. 653 should not be enacted. Before I explain the reasons for this conclusion, I would like to emphasize two reasons upon which we do not place primary reliance. Although S. 653 may in certain regards be constitutionally suspect, that is not our main reason for opposing it. We recognize the existence of authority that the bill's essential purpose, to regulate the scope of federal court jurisdiction over state habeas corpus petitions, is to a large degree within Congress's power.[1]

Nor do we oppose S. 653 because we reject its apparent goals -- namely, to recognize the state interest in finality in the determination of criminal cases, to control the quantity of federal judicial resources spent on state habeas petitions, and to support the legitimate state wish to assure compliance with reasonable procedural rules in state criminal trials and appeals. While we might weigh these goals differently as against the interests of state prisoners with allegations of federal rights denial, we also acknowledge the validity of the goals and agree that determination of the scope of federal jurisdiction over state habeas claims may properly consider them.

Why then do we oppose the bill? There are several reasons. First, it has become apparent to the Supreme Court, as I read the cases, and to scholars writing in the area, that wherever else they may disagree on how the balance ought to be struck in particular cases or classes of cases, federal jurisdiction over state habeas petitions (where there has been a state procedural default) must be defined with flexible rules, which grant power but permit discretion in its exercise,[2] and not with categorical rules flatly denying power. The latter, though arguably easier of application, will predictably result in great injustice and force unneeded constitutional confrontations. In the 28 years since Brown v. Allen,[3] the case that introduced the modern era of federal habeas jurisdiction over state prisoner claims, the justices and commentators have recognized the importance of flexible rules in this area and the Supreme Court has instituted them. S. 653 would undo this history and deny its lessons.

It would do this at a time when we still do not know the impact of the landmark case of Wainwright v. Sykes,[4] decided less than five years ago, on the number and nature of state habeas filings. Notably, the Court's opinion in Wainwright, written by Justice Rehnquist, intentionally left vague the "precise content" of the "cause and prejudice" test[5] there applied to all state petitions containing a procedural default under state law. Concurring, Justice Stevens said he believed the Court "wisely refrained from attempting to give precise content" to the test.[6] S. 653 would now undermine the Court's intention by freezing the definition of the "cause" half of the test.

Our second objection to the bill is based on our conclusion that it will not achieve the purposes it was apparently intended to accomplish. It represents a blind and heavy interference in an area that needs delicate, gradual finetuning. Available statistics, which we cite below, convince us that the bill would not be effective. We believe this may be because those who would reform the area of federal habeas jurisdiction are not fully aware of the nature of the cases that are filed, or their real demand on federal and state resources. Facile references to the number of state habeas filings "clogging our dockets" miss the point. Cases must be weighed according to the amount of time and attention they demand of the court system and respondents. Obviously, an antitrust case that takes three years and a four month trial is different from a breach of contract case that is disposed of within three months of filing on a motion to dismiss. Both are "one case," but to say that and only that seriously obscures the differences between them. Furthermore, it is incorrectly assumed that if we close the federal court door to state habeas petitioners a few inches more, appreciable numbers of cases that might otherwise be filed will not be. There is no basis for this conclusion, as we discuss below.

Our third main reason for opposing the bill, of equal or greater seriousness than the other two, is that its categorical rules denying power may lead to a serious miscarriage of justice. That is always the risk of categorical rules, and no less so here. Indeed, Justice Rehnquist said in Wainwright, when announcing but not defining the "cause and prejudice" test, that the new test would not prevent "a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice."[7] A flexible and discretionary standard permits this result. A categorical rule blanketly denying power may not. The result under the latter is that the Court must either permit the miscarriage of justice to go uncorrected, or it must stretch the meaning of the statute beyond the original intent, or it must declare the statute unconstitutional. This trilemma is entirely avoided with the "common law" discretionary development Wainwright envisions.

In the balance of this testimony we will define the nature of the problem, including the part of the problem the bill aims at (Part II), provide a brief case history of rulings in this area (Part III), analyze what the bill would do and the value of its proposals (Part IV), and discuss the statistical evidence arguing against enactment (Part V).

II. THE NATURE OF THE PROBLEM

Complicated as this area is made by the delicate nature of our federal system and the issues that always arise when Congress seeks to use jurisdictional statutes to achieve a substantive result, the essential problem can be simply stated. Some people, including some innocent people, are convicted at state trials through the use of procedures that violate their rights under the United States Constitution. If the state appellate system does not vindicate their rights, what shall be their remedy in the federal courts other than through direct review in the Supreme Court?

Of course, if we were sufficiently wise so that we could make rules that would open the federal court's habeas door to meritorious state claims and those only, we would wholly solve our problem. But wisdom does not offer this escape and never will. Once the door is open, the good and the bad cases will come in. This leads to the issue which concerned both Justice Frankfurter and Justice Jackson in Brown v. Allen, though from different perspectives.

> The meritorious claims are few, but our procedures must ensure that those few claims are not stifled by undiscriminating generalities. The complexities of our federalism and the workings of a scheme of government involving the interplay of two governments, one of which is subject to limitations enforceable by the other, are not to be escaped by simple, rigid rules which, by avoiding some abuses, generate others.
> (Frankfurter, J.)[8]

> It must prejudice the occasional meritorious application to be buried in a

> flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search.
> (Jackson, J.)[9]

The problem has persisted across the next three decades. We can only approximate an answer to it, unless we want to move to one of the extremes -- close the federal habeas door entirely, assuming the Constitution would permit it, or leave it permanently and wide open. No one has suggested either answer. Each would produce enormous unfairness or disruption or both. But where then do we compromise? And how? Using Justice Jackson's image, we don't want to make the needles, the meritorious claims, impossible to find among the hay, the meritless ones, but by excluding the latter we want to be careful not to exclude the former as well. And we want to do all this while remaining attentive to the state and societal interest in finality and in protecting the integrity of reasonable procedural rules.

S.653 addresses one significant part of the larger problem. It has no direct consequence to habeas petitions previously adjudicated by state courts on their merits. Rather, the bill's concern is the power of the federal courts over petitions raising federal issues which for one reason or another the state courts had not had a chance to determine. In short, the bill addresses in terms of power the problem Wainwright resolved in terms of discretion. Before analyzing the bill, however, a brief case history will be useful.

III. A BRIEF HISTORY[10]

In Brown v. Allen,[11] the Supreme Court held that a state prisoner may seek federal habeas relief even though he did not first seek direct review of his claim in the United States Supreme Court and even though his claim had been fully considered and rejected by the state courts. In Fay v. Noia,[12] the Court upheld the power of a federal habeas court to consider the claim of a state prisoner who had failed to raise his claim in state court, as required by a reasonable state procedural rule. So long as the failure was not deliberate, the federal claim would not be considered waived. This result was reached even though the Court recognized that a state procedural default would prevent it from considering the federal claim on direct review. Although Fay has been limited in subsequent cases, it has not been overruled and probably remains applicable where, as in Fay, the default was a non-delegable decision of the petitioner. In Fay, the state defendant refrained from taking an appeal (a decision he could not delegate to counsel) because of the risk of a death penalty in the event of reversal and reconviction.[13] In Wainwright, Chief Justice Burger and Justice Stevens both believed that the "deliberate bypass" standard in Fay would continue to apply to certain non-delegable decisions of a defendant.[14]

The Wainwright "cause and prejudice" test was foreshadowed in Davis v. United States[15] and Francis v. Henderson,[16] each of which used a collateral attack to challenge, for the first time, the composition of grand juries. Unlike Fay, Wainwright asked under what circumstances a federal habeas court might overlook a state procedural default for which counsel, not the defendant, was responsible, and exercise its discretion to assume jurisdiction. The effect and intention of Wainwright's use of a purposely undefined standard for answering this question is that federal judges will now be able to correct occasional "miscarriages of justice" (if they result from a violation of federal right) and at the same time dismiss those cases in which the procedural default ought not to be excused.[17]

Several other cases deserve mention in this brief history, although they raise different problems of habeas jurisdiction. Townsend v. Sain[18] in 1963 articulated standards a federal judge should apply in determining whether to hold a factual hearing on a state prisoner's claim of constitutional rights violation, where a hearing has already been held and facts found in state court. In 1966, Congress amended §2254(d) to provide statutory guidance on the same subject.

In Stone v. Powell,[19] the Supreme Court limited Brown v. Allen when it decided that federal habeas courts ought not review a state prisoner's claim of unlawful search or seizure if the petitioner had had a full and fair opportunity to raise that claim in state court. It was thought for a time that the Stone v. Powell rationale would apply to all claims that did not affect the accuracy of the determination of guilt. But in 1979, the Court rejected that notion when, in Rose v. Mitchell,[20] it held that a convicted state defendant could challenge racial discrimination in selection of the foreman of the grand jury that indicted him even though the defendant had had a full and fair opportunity to raise the same claim in the state courts. Although the holdings in Rose and Stone are not directly affected by the proposed law, these cases reveal the Court to be quite conscious of a discretionary power to limit habeas jurisdiction and a selective willingness to use it.

Finally, just last year in Sumner v. Mata,[21] the Court reviewed a case from the Ninth Circuit granting habeas relief to a state prisoner on the ground that a photographic identification procedure had violated his Fourteenth Amendment rights. An intermediate California appellate court had earlier rejected the same claim. The Supreme Court held that the presumption of correctness in §2254(d) applied to state appellate court conclusions and that a federal habeas court was required to give in its opinion its reasons for rejecting these. Since the Circuit Court had not done this, the case was remanded.

IV. S. 653 : WHAT WOULD IT DO?

I wish to concentrate on three provisions of S. 653 and on the first of these even more than on the other two. Let me describe them here.

First, the bill would amend 28 U.S.C. §2244 by adding a new subsection (d) which, among other things, would prohibit a federal habeas court from considering a federal question if that question "was not properly presented under State law in the State court proceedings both at trial and on direct appeal, or properly presented in a collateral proceeding and disposed of exclusively on the merits." In other words, the bill first attempts to define what I have been calling a procedural default, and then it withdraws federal jurisdiction if there was one. But there is an exception. Using Wainwright's language, the bill creates a way around this withdrawal if the federal violation "was prejudicial to the petitioner as to his guilt or punishment"[22] and if, in addition, there was cause for the procedural default. Although the word "cause" is not used, it is defined in four subparagraphs. The bill, in other words, would freeze the meaning of "cause" and make its absence jurisdictional.

Second, the bill would add a new subsection (e) to §2244. This subsection would require that a habeas petition be filed "within three years from the date the State court judgment and sentence become final under State law." The only exception to this limitations period comes if the petitioner is relying on a federal right that did not exist at the time of the state trial and which has been determined to be retroactive. The three-year limitations period runs from the date of that determination.

Finally, the bill would amend §2254(d), the section of the federal code added after Townsend v. Sain and which describes the circumstances under which a federal habeas court may hold a hearing on a factual dispute raised by a federal habeas petition. The amendment would give substantially greater weight to an earlier state finding on the contested facts. Among other things, the new provision:

(1) would (inexplicably and needlessly) delete certain catch-all language which simply refers to the petitioner's due process rights (28 U.S.C. §2254(d)(7)) and which one would assume the bill could not revoke in any event;

(2) would require the federal habeas judge to accept a state court's factual finding unless there was "no evidence to support such finding," whereas the federal judge may now reject the finding if it is "not fairly supported by the record"; and

(3) would forbid an evidentiary hearing in federal court unless one of six factors were present, whereas the current law, despite the absence of any of eight (rather than six) such factors, would still allow an evidentiary hearing if the petitioner could show "by convincing evidence that the factual determination by the State court was erroneous."

I consider new subsection 2244(d) first and at greater length because I believe it is the most misguided whatever one's view of the area. As I said earlier, this addition would freeze the meaning of "cause" when the Supreme Court has stated its considered conclusion that it would be most salutary to leave the word undefined in order to protect against true "miscarriages of justice." I should add that it was Justice Rehnquist who said this for a majority of the Court. Why then should Congress charge into the breach? The Court has had no time to develop Wainwright. The lower courts[23] and commentators[24] have only just begun to develop, in a common law way, the proper meaning of "cause and prejudice."

One of the more perceptive law review article on the subject, by Professor Hill at Columbia Law School,[25] makes a cogent argument that the concept of "cause" and the concept of "prejudice" are overlapping, that the first at times subsumes aspects of the second. In this posture, it makes no sense to stunt a new equation, the culmination of three decades of judicial and scholarly analysis, with a fixed and narrow definition of one of its terms.

Furthermore, the bill's restrictive definition of "cause" could well result in extreme injustice. Take this case. After conviction, but before a notice of appeal is filed, the defendant's lawyer suffers a stroke, the notice is not timely filed and the state, under its rules, considers that failure jurisdictional. Read literally, which I assume is the way it is intended to be read, the bill would foreclose federal habeas relief no matter how compelling and how guilt-related the petitioner's claim may be. Or assume through oversight that the defense lawyer in a capital case files the notice of appeal a day late.[26] The defendant has a claim of error that goes to the very heart of his guilt or innocence. The bill as written would forbid federal habeas review. There would be no jurisdiction to hear the matter. Finally, assume the defendant's lawyer makes a grievous error amounting to incompetence, certainly not tactical, and which casts doubt on the defendant's guilt. One example is counsel's unawareness of a state defined affirmative defense which, if proved, as the record discloses it could have been, would reduce the seriousness of the offense. The proposed §2244(d) envisions no recourse in federal court, again by denying jurisdiction.

With regard to these hypotheticals, the current "cause and prejudice" test would permit a federal judge, as a matter of discretion, to find each and to hear the claimed denial of federal right. On the other hand, if the bypass was not inadvertent or if the lost opportunity to present the claim was not prejudicial, the federal judge could dismiss, again as a matter of discretion.

Let me now concentrate for a moment on the requirement that the petitioner have presented his federal question "both at trial and on direct appeal." (Emphasis added.) What happens if the petitioner fails to raise the issue at trial, but does so on direct appeal and the state appellate court considers it? Are we to say that the federal court should be more insistent on a state defendant's compliance with state procedural rules than the state itself? This is not now the law, as the recent case of Sumner v. Mata[27] attests. If the state is willing to excuse the default, why should the federal court insist on citing it?

Finally, the proposed language says nothing about the adequacy of the state procedure for raising the federal question. The language in proposed §2244(d)(2) recognizes cause if the state procedure "precluded the petitioner from asserting the right sought to be litigated." Is it intended that the word "precluded" absorb the extensive case law on what constitutes an "adequate" state ground foreclosing federal review? What if the procedure is there but easily missed?. Does such a law "preclude" assertion of a challenge on constitutional grounds? Not literally. But it is exactly this sort of rule that the Supreme Court may consider "inadequate" to prevent direct review in the Supreme Court itself.[28] Does S. 653 mean to create a narrower definition of "adequate state ground" to apply only in the habeas area? I doubt the constitutionality of such an effort.

I have not tried to exhaust the possible situations that may arise in which a restrictive definition of "cause" would work serious injustice. Like the Wainwright Court, I believe it would be impossible to do so. I do not doubt, however, that such instances will arise and when they do, S. 653 will force the federal courts either to find its provisions unconstitutional or to strain the language of the statute beyond its intended meaning. This is often a danger when Congress substitutes a denial of power for discretion through the use of jurisdictional statutes.

One argument in favor of a narrow definition of the word "cause" is that this may lead to a reduction in the number of state habeas filings and ease federal court congestion. This is a baseless guess, as I shall show below, and not worth the price of a constitutional confrontation or the sacrifice of three decades of judicial experience.

I now turn to proposed §2244(e), the limitations period. When a state prisoner is successful in obtaining habeas corpus relief, the state usually has an opportunity to retry him. If the habeas relief comes long after the original conviction, that opportunity may be quite hollow. Witnesses die, evidence disappears. The idea of a limitations period is a sound one -- to an extent. In fact, there already is one in the law. I refer to Rule 9(a) of the Rules Governing Section 2254 Cases in the United States District Courts. It provides:

> (a) Delayed petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

I believe that this provision sufficiently protects the state interest and that there is no need for a specific time limit. Certainly, I am aware of no indication of prejudice to the state with regard to the very small number of state habeas petitioners who are actually ordered released. Nor do I see any reason to provide a federal limitations period if the states themselves do not do so with regard to their own collateral attack procedures.

. In addition, there are serious problems with the proposed limitations period. First, the three-year period runs from the time the state court judgment and sentence become final under state law. This will genreally occur after direct review is complete. The federal law, however, will continue to require exhaustion of state remedies, §2254(b) and (c), and the state defendant may therefore be required to raise on collateral attack in state court an issue not decided on direct state review. The state collateral determination may take more than three years and if it does, if for example state judges take lengthy periods of time to decide motions or the merits in the case, the would-be federal petitioner may find that he has exhasusted his state remedies, as required, only to have the federal limitations period expire in the interim.

A second problem with the definite limitations period is that the petitioner may be claiming denial of federal rights arising out of the state prosecutor's supression of evidence or information. The federal petitioner may not have had occasion reasonably to have learned about the supression until more than three years after his conviction became final under state law.

I realize the value of a definite limitations period, but these examples, and I am sure there are others, show its dangers as well. I believe the state interest can be recognized through a laches provision, as Congress only five years ago codified in section 9(a) quoted above. Absent any proof that this provision has not sufficed, I do not believe the proposed limitations period should be enacted.

The bill's attempt to give greater recognition to state factual determinations is understandable and extends a preference in current law. But the extension, again, is unnecessary. The Supreme Court has recently shown its willingness to insist on lower federal court deference to state factfinding absent "convincing" evidence that the finding was erroneous. Justice Rehnquist, writing for himself and five others, said that:

> Congress meant to insure that a state finding not be overturned merely on the basis of the usual "preponderance of the evidence" standard in such a situation [habeas corpus]. In order to ensure that this mandate of Congress is enforced, we now hold that a habeas court should include in its opinion granting the writ the reasoning which led it to [reject the presumption contained in §2254(d)].[29]

Other than for show, then, I simply do not see a need for further legislation in this area. Given the miniscule number of hearings that are actually held, it could hardly be contended that the lower federal courts are undermining a federalism interest by their failure to accept state factual determinations.

V. THERE IS NO NEED FOR S. 653

There remains the argument that the bill is needed because a large number of state habeas corpus petitions are congesting the federal courts. There are two answers to this argument. First, it isn't true. Second, the bill would not make a difference anyway. Let me explain what I mean by the second answer before proceeding to a longer discussion of the degree to which state habeas cases truly clog federal court dockets.

The question is how wide ought we open the federal court door to state prisoners with claims of federal rights violation. No one has suggested closing it entirely or opening it wide and permanently to everyone. If I can take this image a step further, the Supreme Court has proposed a sort of swinging door in cases of state procedural defaults, with the thrust and degree of the swing determined in part by assessing the "cause" for the procedural default and the "prejudice" if the petitioner's substantive claim goes unreviewed. S. 653 would change that result by nailing the door into a fixed position in all procedural default cases, come what may.

If the door is not going to be closed entirely, that is if there are going to be categories of state prisoners for whom it will be open despite procedural defaults, petitioners are going to try to squeeze themselves into those categories. After all, we are not talking about putting an armed guard at the clerk's office to prevent actual filings of petitions. The petitions will therefore come, so long as the door is open at all, and the petitioners will make arguments that they fit within one of the exceptions to the rule that a procedural default forecloses review, whether the foreclosure rule is a matter of jurisdiction, as the bill would have it, or a matter of discretion, as Wainwright provides. It will take time, as now, to dismiss the petitions. Someone will have to review them, as now, to determine if their claims are indeed within an exception as the prisoner asserts. The state will have to respond to the ones that assert a colorable claim, as now. And, as now, a large number of filings will be dismissed very early on. To suggest that narrowing the categories will somehow reduce the filings appreciably is wishful thinking. As long as the door is open to the "needles," the "hay" will also enter.

A more dramatic argument against the claim that the bill will unclog the courts is that they are not now clogged with state habeas petitions. Let us look at the figures provided by the Administrative Office of the United States Courts. All figures are for the year ending June 30, 1980.[30]

In that year, there were 196,757 criminal and civil filings in district courts. Of these, 7031 were habeas corpus petitions of state prisoners. (There were many more actions filed by state prisoners, but they weren't seeking habeas corpus relief. The proposed bill would not affect them.) This means that 3.5 percent of the total filings in 1980 were state habeas petitions. This hardly amounts to clogging. (If state habeas petitions are taken as a percentage only of civil filings, the result is 4.16 percent.)

The number of state habeas petitions is decreasing. From 1975 to 1980, the filings went down 10.4 percent. From 1979 to 1980, the decrease was 1.3 percent.

The stage at which habeas petitions are disposed of is also informative. Of the 6,590 habeas petitions terminated in the year ending June 30, 1980, 6,362 (96.5 percent) were dismissed before pretrial. The equivalent percentage for all civil cases terminated at this stage (excluding condemnation cases) was 79.0.

Only 133 (2 percent) of all habeas cases terminated with a trial (131 of them before a judge). For all civil cases (excluding land condenmation cases) 10,091 (or 6.5 percent) terminated with a trial (3,920 of them to a jury).

How long do state habeas cases stay in the courts? Again the figures are dramatic. For all civil cases (excluding land condemnation, habeas and deportation cases), median time in the courts was eight months. For state habeas cases, the median time from filing to dismissal was four months.

There were 199 habeas trials in the twelve months ending June 1980. Of these, 194 were to a judge and 173 of them took one day or less to try. By contrast, there were 19,585 civil and criminal trials in the same period, more than a third of which (7,353) were jury trials, and 3,970 of which took four or more days to try. In other words, less than one percent of all federal trials are held in habeas cases and a small fraction of one percent of all trial days are spent on habeas cases.

What these figures show is that the number of habeas petitions are a small percentage of the total number of filings, that they are quickly dismissed, and that when they do result in trials, the trials almost always consume a day or less.

But the most dramatic fact is yet to come. The proposed law would only affect those habeas filings which show a state procedural default. It would not reverse Brown v. Allen. It would have no affect on habeas filings that raise federal claims previously presented to the state courts, so long as these were filed within the three-year limitations period.[31] There are as yet no statistics on the court congestion caused by habeas cases containing state procedural defaults. Whatever their number, the Wainwright test would already result in dismissal of most of these cases. What is left to fall under S. 653's ax? Those few cases containing state procedural defaults and which, under Wainwright, the federal courts and ultimately the Supreme Court believe contain the ingredients of cause and prejudice such that the federal courts ought examine the state conviction. But not even all of these, for some would also satisfy the bill's definition of cause and prejudice. Given the infinitely small number of habeas petitions that are successful, this bill is likely to make a difference in virtually no case whatsoever.

VI. CONCLUSION

We accept the congressional role in this area. But recent case law and the statistical evidence of the demands habeas petitions make on the federal courts and respondents both argue against a need for congressional intervention now. The federal courts are not being overwhelmed with state habeas petitions. The relatively small number of such petitions S.653 would affect in any event does not justify its enactment. This is especially so given the constitutional confrontation to which it may lead and the "miscarriages of justice" that may stand uncorrected if the bill becomes law. The Supreme Court has shown itself attentive to the problem and capable of finding solutions. There is no reason for Congress to act and many reasons to hesitate.

Thank you for this opportunity to present our views.

FOOTNOTES

[1] Until 1867, there was no federal authority to review detention under state law. Bator, Finality In Criminal Law And Federal Habeas Corpus For State Prisoners, 76 Harv. L. Rev. 441, 465 (1963). No justice has suggested that Congress is required to grant such authority. Compare Fay v. Noia, 372 U.S. 391, 406 (1963), with Wainwright v. Sykes, 433 U.S. 72, 105-106 & n.8 (1977) (Brennan, J., dissenting). Determinations of state habeas petitions have been based on statutory construction and notions of comity. See, e.g., Wainwright, 433 U.S. at 77 & 84. See also Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 170-72 & n.153 (1970), Note, Developments in the Law — Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1268 (1970), Brown v. Allen, 344 U.S. 443, 486 (1953).

[2] See, e.g., Wainwright, 433 U.S. at 91-92; 433 U.S. at 94-97 (Stevens, J., concurring). See also Fay, 372 U.S. at 438 (recognizing discretion).

[3] 344 U.S. 443 (1953).

[4] 422 U.S. 72 (1977).

[5] Id. at 91.

[6] Id. at 96.

[7] Id. at 91. Concern that habeas relief be available in case of miscarriage is found repeatedly. See Brown, 344 U.S. at 503 (Frankfurter, J.) and 553 (Black, J.); Fay, 372 U.S. at 426; Jackson v. Virginia, 443 U.S. 307, 322 (1979).

[8] 344 U.S. at 498.

[9] Id. at 537.

[10] Bator, supra note 1, contains a thorough review of the cases and statutes through Brown v. Allen. For subsequent developments see Michael, The "New" Federalism and the Burger Court's Deference to the States in Federal Habeas Proceedings, 64 Iowa L. Rev. 233 (1979).

[11] 344 U.S. 443 (1953).

[12] 372 U.S. 391 (1963)

[13] Id. at 439-440.

[14] 433 U.S. at 91-94 (Burger, C.J., concurring); id. at 94-97 (Stevens, J., concurring).

[15] 411 U.S. 233 (1973).

[16] 425 U.S. 536 (1976).

[17] Wainwright, 433 U.S. at 87-91. Wainwright makes it clear that its cause and prejudice rule is "narrower than the standard set forth in dicta in Fay" and expresses no opinion on whether the Fay standard should continue to apply to facts like those in Fay. Id. at 87 & n.12.

[18] 372 U.S. 293 (1963).

[19] 428 U.S. 465 (1976).

[20] 443 U.S. 545 (1979).

[21] 444 U.S. 539 (1981).

[22] *Wainwright* sometimes uses "actual prejudice," 433 U.S. at 91, and it decidedly does not use "as to his guilt or punishment."

[23] *See, e.g.*, Goodman & Sallett, *Wainwright v. Sykes: The Lower Federal Courts Respond*, 30 Hast. L. J. 1683 (1979).

[24] In addition to the articles cited at notes 10 & 23, *supra*, *see* Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 U. Pa. L. Rev. 473 (1978), Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035 (1977).

[25] Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 Colum. L. Rev. 1050 (1978).

[26] This was Daniels v. Allen, 344 U.S. 443 (1953). Justice Harlan, not then on the Court, later said that "persuasive arguments can be made that [the one day delay] is not" an "adequate" state ground. 372 U.S. at 462.

[27] 449 U.S. 539 (1981).

[28] *See* Hill, *supra* note 25, at 1078 & n.160.

[29] 449 U.S. at 551 (1981).

[30] All statistics come from *Annual Report of the Director of the Administrative Office of the United States Courts* (1980).

[31] A recent study indicates that most petitions are filed within three years of conviction. Robinson, *An Empirical Study of Federal Habeas Corpus Review of State Court Judgments* 43 (1979).

PREPARED STATEMENT OF RICHARD J. WILSON

Senator Heflin, Members of the Committee, it is my privilege to appear before this body on behalf of the National Legal Aid and Defender Association (NLADA) to offer testimony in opposition to S. 653. This legislation proposes several changes which would modify the provisions of Sections 636, 2244 and 2254 of Title 28 of the United States Code, which relate to the handling of petitions for Habeas Corpus relief by state prisoners.

Summary of Position

S. 653 will not accomplish the purposes for which it is proposed. When the bill was introduced in the Senate in March of this year, its provisions were justified on grounds that they will stem an "explosion" in the use of the writ of habeas corpus by state prisoners; that they will greatly assist in lending finality and certainty to the decisions of state courts; and that they will eliminate "unnecessary friction" between state and federal courts.

In fact, all evidence on the use of federal habeas corpus by state prisoners indicates that despite a precipitous growth in criminal convictions, prison populations, the assistance of counsel and the availability of collateral attack remedies in state court, federal habeas corpus filings by state prisoners have declined acutely over the last decade and constitute a manageable portion of the civil docket of the federal trial courts.

Moreover, the purported goal of greater finality to the judicial process would not be accomplished even if these provisions were adopted and allowed to fully take effect. Prisoners would not be prevented from filing petitions which must be dealt with, however expeditiously, and difficult questions would still require extensive, perhaps protracted, examination at all levels of the federal system. Because federal courts are the most appropriate venue for final decisions on the vindication of federal constitutional rights, there is little doubt that decisions contrary to those reached by the states will, so long as our nation survives, create tension between our federal and state forums. This tension is integral to the delicate and intricate system of checks and balances which S. 653 seeks to curtail.

The proposed amendments may create serious new problems. The proposal to eliminate the evidentiary hearing powers of federal magistrates, aside from overturning a process approved overwhelmingly by this body only five years ago, would increase, not alleviate, the burden on the federal court system. No good reasons have been offered to exempt only state prisoners' habeas corpus factfinding from all factfinding and other powers of the magistrate.

Next, the amendments would result in totally arbitrary exclusion of certain state court defendants from the federal habeas process. Those persons whose cases cannot, for reasons totally out of their hands (such as recalcitrant court reporters, incompetent counsel, or deadlocked appellate tribunals), move through the state court direct and collateral attack process within three years would be forever barred from relief in federal court, despite a showing of merit to their claims. The ironic result may be that only the most "open and shut" of state court cases will be absolutely guaranteed access to all steps of federal collateral review.

Finally, attempts to impose a "full and fair hearing" restriction on federal access by state prisoners may well be unconstitutional. The limitation, if adopted, would not stop litigation but would only complicate it further. The legacy of Stone v. Powell, 482 U.S. 465 (1976), upon which the amendment is premised, has not been a clear line of cases restricting access to federal courts on Fourth Amendment exclusionary rule claims. Instead, another step is added in making determinations as to what is "full" and what is "fair." Barring habeas relief for all claims in which the state court has afforded petitioner a "full and fair hearing," would geatly expand the narrow scope of the ruling in Stone v. Powell, and would fly directly in the face of notions of federal supremacy in the final interpretation of federal constitutional claims.

The Interest of NLADA

The National Legal Aid and Defender Association is a membership organization which has been in existence since 1911. Its members include the vast majority of both public defender and legal aid programs and attorneys in the United States. At present, NLADA's total membership numbers approximately 2,500 programs and 1,000 individuals, and includes substantial numbers of private attorney and client community persons. NLADA's most important mission is the improvement of access to justice for the poor and underprivileged. Persons without funds to afford retained counsel are most frequently those accused and convicted of serious criminal activity, for which they may receive extensive sentences or even the penalty of death. Our members' clients include disproportionate numbers of the uneducated and minorities, whose federal constitutional rights have traditionally suffered most at the hands of insensitive or biased finders of fact. Without adequate counsel to assist in their defense, and without the broadest range of remedies available to them, these persons would suffer unduly in our judicial system, and will continue to be treated without the respect and equality that is due all of our citizens. It is in the name of equal justice for all that NLADA opposes S. 653.

Illinois and the National Experience with Federal Habeas Corpus

For eight years prior to my arrival in Washington I served as an appellate public defender with the State Appellate Defender Office of Illinois. In Springfield, I managed a large staff whose sole responsibility was the pursuance of appellate rights on behalf of the indigent convicted defendant. My office's clients were not minor offenders. Well over 90% had been convicted of felony offenses, and the overwhelming majority were imprisoned. My office was empowered by statute to pursue appellate or collateral remedies, if necessary, to obtain a fair determination and just outcome.

My office filed approximately 1,250 cases in courts of review during my tenure there. Of that number only 3 were pursued into federal court by means of habeas corpus. The same was true of the entire agency, which handled virtually all appeals in Illinois except those with conflicts of interest and some appeals in Cook County. Since its opening in 1972, the State Appellate Defender has filed nearly 10,000 appeals in various courts of review. Of these filings, only 77, less than one percent, were pursued on habeas corpus in the federal courts. These statistics are revealing for two reasons relevant to the legislation under consideration today. First, they demonstrate that the properly counseled defendant will not abuse the system by pursuing remedies for their own sake. Our clients, satisfied with the representation they had received, were content, in the vast majority of cases, with the outcome of their appeals in state court, and confident that the state courts of appeal had properly adjudicated both state and federal rights. More importantly, however, these statistics soundly refute any suggestion that there exists, now or in the past, any systematic and pervasive scheme to abuse the process of our system merely because the right exists. While there may be other points in the system where public confidence in the courts has justifiably eroded, it is simply not true in Illinois that abuse of federal habeas corpus has led to an expectation that state court decisions are not final and dispositive, even of federal rights.

The same is true, it can be concluded, at the national level. Since the decision of the United States Supreme Court in Douglas v. California, 372 U.S. 353 (1963), which mandates the provision of counsel to the indigent on appeal, some 26 jurisdictions* have adopted systematic and centralized statewide mechanisms for the delivery of counsel to defendants on appeal. State officials in these jurisdictions have joined a growing body of informed policymakers who have recognize that provision of capable counsel on a system-wide basis will greatly contribute to the efficiency of the entire appellate process, including the federal court system, and that "friction" between federal and state courts regarding the interpretation of federal court rights can be minimized.

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*Alabama, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, West Virginia, Wisconsin, Wyoming.

An examination of the national dimensions bears this out. During 1981, only 7,790 petitions for habeas corpus relief were filed by state court prisoners. 1981 Annual Report of the Director (Preliminary), Administrative Office of U.S. Courts (June 30, 1981), Table C5B. This number represents a 14% decline in the total filings during the year 1970 when over 9,000 petitions were filed.* During the same year, well over 2.25 million criminal cases were disposed of by state courts of general jurisdiction, and at least that same number in courts of more limited jurisdiction. Sourcebook of Criminal Justice Statistics, 1980, pp. 404-407. In the last reported year, there were more than 80,000 criminal jury trials in state courts of general jurisdiction. Sourcebook, 1980, pp. 409-410.

Even more revealing is the data regarding disposition of state-prisoner habeas corpus actions. In all federal district courts in 1981 (year ending June 30, 1981), a total of 177,975 civil cases were disposed of by federal district courts. 7,302 of that number, or 4%, were state-prisoner habeas dispositions. Evidentiary hearings in state-prisoner habeas actions occurred in only 165 cases. Trials on all civil actions in federal court amounted to a total of 11,933. 1981 Annual Report of the Director, Tables C5 and C5B. Thus, evidentiary hearings in habeas corpus actions by state prisoners accounted for only 1.3% of the total trials in all civil actions in federal court in 1981. So much for the "flood of litigation" theory.

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*A more disturbing fact was the precipitous increase in civil rights actions by state court convicts, which jumped by 155% during the period from 1975 through 1981, accounting for a total of 15, 639 such actions last year. 1981 Annual Report of the Director, Table 21.

From all available data, it appears not only that federal habeas petitions and hearings remain a very small number, but that the number of cases is declining further, even as the number of state court convictions continues to increase.

Illinois presents a microcosm of another pervasive problem with the vindication of federal constitutional rights in a state court forum. Illinois has provided for collateral attack of convictions in state court by three alternative methods. These are post-conviction petition, Ill. Rev. Stat., Ch. 38, Sec. 122 et seq. (1965); state habeas corpus, Ill. Rev. Stat., Ch. 65 (1959); and "Section 72" petition, a consolidation of old common-law writs such as coram nobis into a single section of the Civil Practice Act. Ill. Rev. Stat., Ch. 110A, Sec. 72 (1963). Although the oldest of these remedies has existed for over a century in Illinois*, all have proved virtually useless and futile as a means of collaterally attacking a criminal conviction on federal constitutional grounds. The only remedy which specifically permits the raising of federal constitutional claims, the post-conviction remedy, specifically requires that the applicant return to the same judge before whom the original case was tried. Such a requirement, along with other difficult pleading requirements and a two-tiered review system, virtually guarantees that recognition of federal rights is at best cumbersome and slow, and oftimes wholly unavailable in the state court system. The Seventh Circuit United States Court of Appeals recognized this fact in U.S. ex rel. Williams v. Brantley, 502 F.2d 1383 (1974) when it held that pursuance of post-conviction relief in Illinois was almost wholly futile.

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*Habeas Corpus, R.S. 1874, p. 565, Sec. 1.

My own experience bears this out. During my entire tenure with the Office of the State Appellate Defender, I recall only one successful state post-conviction petition in eight years, a decision of great notoriety with such compelling facts it could not be ignored. People v. Garrett, 62 Ill. 2d 151, 339 N.E. 2d 753 (1975).* My clients never expected relief in such circumstances, and most waited patiently to begin the process in federal court, sometimes years after their conviction in state court. Frequently, their release occurred before exhaustion of state court remedies.

Nationally, the picture is worse. While hard data on the existence and efficacy of post-conviction procedures is difficult to find, one author suggests that in 1975, 14 states (almost 30%) had no post-conviction procedure. Popper, Post Conviction Remedies in a Nutshell (1978), p. 50. If the experience of remaining states parallels that of Illinois, there is no reason to believe that the vindication of the federal constitution fares any better in any other jurisdiction.

The failure of state courts to provide meaningful collateral review of criminal convictions is part of the more general problem of the manner in which many state courts deal with federal constitutional issues raised by convicted defendants. It is no accident that most of the significant decisions in criminal law have come from federal courts at all levels.

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*Garrett, in fact, is not a "pure" post-conviction remedy case, but one in which the petition was dismissed and later consolidated with the direct appeal.

In most states an elected local judiciary is requested to grant relief to a person whom the community may believe has committed a crime, but the same reluctance is found throughout other state court systrems. While it is certainly true, as the proponents of S. 653 suggest, that the federal courts are not the only guardians of the Constitution, history has demonstrated conclusively that the federal courts have been truer guardians than their state court counterparts.

The failure of state systems to provide meaningful remedies and relief to criminal defendants is also one of the primary reasons for opposing any limitation on the time in which a federal habeas corpus petition may be brought. Contrary to the impression intended by the proponents of S. 653, the number of claims filed outside the proposed three-year limitation is miniscule indeed. Those few cases in which a late petition is filed usually occur either as a result of a prison inmate having no means or knowledge of how to assert a claim earlier, or because the prisoner is in the state court review process, direct or collateral, which must be satisfied before filing in federal court. As noted above, convicted criminal defendants do not routinely appeal their convictions, do not usually receive any post-conviction legal assistance, and do not have ready access to the courts. S. 653 would penalize those who are least able to help themselves.

S. 653 and the Death Penalty

As of October 20, 1981, the total number of inmates on Death Row in the various states totaled 891. The number of persons sentenced to death increases almost daily. Death Row, U.S.A., NAACP Legal Defense Fund, Inc., October 20, 1981. Only four executions have occurred since

1976. The remaining convictions are virtually all in the appellate process. Such must be the case, given the irrevocable nature of the penalty of death.

The United States Supreme Court has frequently recognized that the death penalty is unique in its severity, and that such a draconian step must be attended by special protection of the due process rights of the persons chosen for the capital sanction. Beck v. Alabama, 447 U.S. 625, 637-638 (1980); Gardner v. Florida, 430 U.S. 349, 359 (1977); Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

Any competent attorney charged with the appellate defense of a person under sentence of death would think long and hard before ignoring valuable remedies such as federal habeas corpus which might save the client's life. Similarly, this Committee should thoughtfully consider the remifications of adoption of S. 653 as it may affect the special class of persons on Death Row.

According to the NAACP Legal Defense Fund, a rough count indicates that there are presently approximately 85 capital cases pending on federal habeas at the District Court level, and another 35 to 40 cases pending in the Circuit Courts of Appeal. Most of the cases at both the trial and appellate levels are pending in the South, thereby exerting particular pressure on the southern District Courts and the Fifth Circuit United States Court of Appeals.

Much of the criticism of "abuses" of the writ of habeas corpus by state prisoners emanates from Southern prosecutors, practitioners and judges. These concerns are understandable, given the pressures created on the system by a high proportion of death sentences in Southern states.* However, two clear consequences flow from the choice of these states to impose the penalty of death with increased frequency. First, the costs of imposition of capital sentences will inevitably be high, since every avenue for relief, including review under federal habeas corpus, must be pursued to ensure that the death penalty is not discriminatorily, arbitrarily or mistakenly imposed. Death is different from any other punishment. A mistaken or improper conviction cannot be corrected when the defendant is dead. Second, the fact that heavier use or even abuse of the writ may occur on a regional basis does not militate revision of habeas provisions for all convictions in all states. As was conclusively shown above, the remedy is not being systematically abused at all. In fact, it has been used judiciously, moderately, and with decreasing frequency on a nationwide basis.

The problems in death penalty litigation are unique. Emotions run high and locally elected tribunals are even more likely than normal to succumb to pressure from the media and public to uphold death sentences. Trials are usually long, and require preparation of extensive transcripts for review by the appellate courts. Because of the length of transcripts and the necessity for strict scrutiny, state appellate and post-conviction judges are more likely to linger over the decisionmaking process. These factors make the imposition of a three-year statute of limitations particularly onerous to the individual under sentence of death. These persons are the most deserving of independent, neutral review and should not be completely precluded from consideration through no fault of their own.

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*75% of all current death penalty convictions occurred in the South. Nearly half of all the persons now under sentence of death were convicted in Florida, Georgia and Texas.

Two recent examples will suffice to demonstrate this point. James Burns was convicted on March 3, 1974 and was sentenced to death. On May 3, 1977 his direct appeal was affirmed in the Texas Court of Criminal Appeals. Mr. Burns subsequently pursued state post-conviction proceedings which resulted in denials at both the trial and appellate levels, the latter occurring on February 22, 1978, nearly four years after his conviction. In September of 1980, Mr. Burns successfully petitioned the Fifth Circuit U.S. Court of Appeals for relief from his sentence of death, nearly six-and-a-half years after his original conviction. Burns v. Estelle, 626 F. 2d 396 (5th Cir. 1980).

Ernest Smith was convicted and sentenced to death in Texas on March 26, 1974. His direct appeal was affirmed on February 14, 1976. Mr. Smith pursued collateral remedies in the Texas system, finally conpleting that process in April of 1977, three years and one month fromhis conviction. Under the proposed amendments, Smith would be forbidden from pursuing federal habeas corpus, since he could not have filed before three years were up without first running afoul of exhaustion requirement. He would have missed by a single month the three-year deadline now proposed. Mr. Smith went on with his federal claims, through the district court and court of appeals. In May of 1981, Mr. Smith successfully argued to the United States Supreme Court that his death sentence was improperly obtained, and a new sentencing hearing was ordered. Estelle v. Smith, 68 L.Ed. 2d 359 (1981).

These cases demonstrate both the vitality of our presnt habeas provisions as a means of vindication of federal rights, and the high likelihood of arbitrary exclusion of the most needy from that process, should the provisions of S. 653 be adopted.

The Specific Amendments Proposed in S. 653

Section 636(b)(1)(B): This proposal would eliminate the power of United States Magistrates to hear evidentiary hearings in applications for writ of habeas corpus by state prisoners. No rational reasons are offered for the exclusion of only this category of cases from the jurisdiction of magistrates to make findings of fact and recommendations to the district court. If expeditious and final review of state court decisions is the goal of this legislation, this amendment works contrary to that goal. According to the proponents themselves, shifting the factfinding process to federal district judges would add approximately 200 hearings to district court calendars per year. Congressional Record, S 1982, March 10, 1981. If "abdication of the judicial function" is the problem, the proponents are wrong. Section 636 presently states that, "a judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. Sec. 636(b)(1).

The present language of Sec. 636 was adopted only five years ago in 1976. At the time of its original enactment, these provisions were hailed as a substantial step forward in streamlining the factfinding process at the trial level in federal courts. Both chambers of Congress considered whether the delegation of factfinding authority to magistrates would be an undue incursion into the authority of district court judges. The

House report, No. 94-1609, concluded that, "... the ultimate adjudicatory power over ... habeas corpus ... is exercised by a judge of the court after receiving assistance from and the recommendation of the magistrate." 94-577, 1976 United States Code Congressional and Administrative News, p. 6162, 6171. The proponents have not demonstrated any systematic abuse of this factfinding power by the magistrates. Instead, they argue that a single magistrate is empowered to overrule state-court factfinding "in practical effect." As demonstrated by both the statutory language of Sec. 636, as well as the legislative history, this is simply not the case.

Section 2244 -- "Codification" of Wainwright v. Sykes: A new subsection is added to 28 U.S.C. Sec. 2254 which purports to codify the holding of the United States Supreme Court in Wainwright v. Sykes, 433 U.S. 72 (1977). This proposal expands the scope of the definition of "cause and prejudice" so drastically as to virtually eliminate access to the federal courts by state prisoners whose state court proceedings have been marred by negligent or incompetent representation by counsel.

In Wainwright v. Sykes, a divided Court ruled that in certain circumstances federal habeas corpus petitioners could be denied relief because they failed to follow some state procedural rule. In Sykes, petitioner's counsel failed to make the requisite "contemporaneous" objection to the introduction of an illegally-obtained confession. Sykes bars litigation on federal habeas corpus of issues not properly raised in state court, unless "cause and prejudice" is shown for failing to comply with state procedures.

The proponents of this proposal suggest a detailed definition of what constitutes "cause."

Two major problems are apparent in the proposed amendments. First, the burden to establish that a waiver has not taken place is shifted to the petitioner. This is contrary to established constitutional principles and case law in the federal courts. Federal habeas corpus courts have long adhered to the rule that there is no presumption in favor of waiver under the deliberate bypass test, and that every presumption against waiver should be indulged. United States ex rel. Linde v. Brierly, 437 F.2d 324, 326 n. 12 (3rd Cir. 1970); United States ex rel. Turner v. Rundle, 438 F.2d 839, 843 (3rd Cir. 1971); In Re Kravitz, 488 F.Supp. 38, 48 (M.D. Pa. 1979).

Second, the grounds set forth for establishment of cause and prejudice do not include the negligent or ineffective assistance of either trial or appellate counsel in the state courts. The lack of inclusion of this element precludes the petitioner from assessing responsibility for serious procedural defaults where it properly lies. Clearly, where representation by counsel rises to the level of ineffective assistance sufficient to violate the Sixth and Fourteenth Amendments to the United States Constitution, the petitioner should be held to have overcome the requirement that he demonstrate cause or prejudice. The same is true when the attorney's conduct can be found to be unreasonable, even if short of ineffective assistance. In this regard, it should particularly be noted that petitioner's procedural fault in Wainwright v. Sykes was not excused for "cause" in part because petitioner expressly waived any ineffectiveness of counsel claim. Wainwright v. Sykes, 433 U.S. at 96 (Stevens, J., concurring).

Section 2244 — Three-year statute of limitations: Much has already been said in this paper regarding the arbitrary imposition of a three-year time limit for the seeking of federal habeas corpus by state prisoners.

In sum, such time limits would not prevent access to the federal courts for the overwhelming majority of state court petitioners. Moreover, a three-year limitation would arbitrarily bar federal-court access to a significant number of individuals most deserving of review, particularly those under sentence of death.

It should be noted that Rule 9 of the rules governing Section 2254 cases in the United States District Courts, adopted in February of 1977, originally contained a provision which established a rebuttable presumption of prejudice to the state if the petition was filed more than five years after conviction, such period to run from the time of final judgment in state court. 28 U.S.C.A., Rule 9, foll. Sec. 2254, Historical Note, p. 1136 (1977). Public Law 94-426, Sec. 2(7) struck out this provision. Legislative history indicates that both chambers of Congress found that the imposition of arbitrary time limits and a requirement that the petitioner overcome prejudice constituted "unsound policy." See, 1976 United States Code Congressional and Administrative News, p. 2478, 2481. If it was unsound policy, in 1976, to establish a rebuttable presumption of prejudice to the state after five years, a three-year statute of limitations without any exceptions for "cause" seems draconian by comparison.

Section 2254(d): Proposals to modify this section seek to prevent federal courts from holding evidentiary hearings if the state court conducted an evidentiary hearing that "fully and fairly" resolved the merits of the factual dispute. This amendment purports to codify the holding in Stone v. Powell, 428 U.S. 465 (1976).

These amendments eliminate the presumption of correctness of state court findings of fact, and substitute language that state court facts are not to be re-determined or re-litigated by a judge or court of the United States, unless certain narrow exceptions are established. Evidentiary hearings are eliminated "when the state court records demonstrate the factual issue was litigated and determined."

This proposal goes far beyond the scope of Stone v. Powell, which was strictly limited to application by the federal courts of the exclusionary rule to Fourth Amendment claims by state court prisoners. The proposals expand this rule to all constitutional claims. The language of the amendments effectively precludes the federal courts from reaching federal constitutional issues, if previously litigated in the state courts. As demonstrated in this statement, the rules of procedure in state-court direct appeal and collateral attack proceedings, as well as their application, are frequently so byzantine and restrictive that the federal court is the only forum in which a neutral, detached decision regarding federal constitutional rights can be made.

This proposal is premised upon an erroneous theory that federal courts routinely run roughshod over factfinding decisions by state courts. As statistics from the Administrative Office of the United States Courts demonstrate, this is simply not the case. In 1981, of the 7,790 petitions for habeas corpus filed by state prisoners, evidentiary hearings were held in only 165 cases. This figure conclusively demonstrates that federal courts overwhelmingly defer to the factfinding capabilities of state courts.

Re-determination of facts already determined is totally unnecessary and unproductive. However, when re-examination of the facts leads to vindication of a federal constitutional right, the federal courts are required to intervene. Former Justice Stewart recognized this fact in his majority opinion in Jackson v. Virginia, 443 U.S. 307, 322 (1979), when he stated that:

> ... the problems of finality and federal-state comity arise whenever a state prisoner invokes the jurisdiction of a federal court to redress an alleged constitutional violation ... although state appellate review undoubtedly will serve in the vast majority of cases to vindicate the (federal constitutional right here in question) the same could also be said of the vast majority of other federal constitutional rights that may be implicated in a state criminal trial. It is the occasional abuse that the federal writ of habeas corpus stands ready to correct. (Emphasis added.)

Justice Stewart's response to the argument that the petitioner had been afforded a full and fair hearing in Virginia provides a fitting close to this statement.

> A judgment by a state appellate court rejecting a challenge to evidentiary sufficiency is of course entitled to deference by the federal courts, as is any judgment affirming a criminal conviction. But Congress in Section 2254 has selected the federal district courts as precisely the forums that are responsible for determining whether state convictions have been secured in accord with federal constitutional law. The federal habeas corpus statute presumes the norm of a fair trial in the state court and adequate state post-conviction remedies to redress possible error. See 28 U.S.C. Secs. 2254(b), (d). What it does not presume is that these state proceedings will always be without error in the constitutional sense. The duty of a federal habeas corpus court to appraise a claim that constitutional error did occur -- reflecting as it does the belief that the "finality" of a deprivation of liberty through the invocation of the criminal sanction is simply not to be achieved at the expense of a constitutional right -- is not one that can be so lightly abjured.
>
> Jackson v. Virginia, 443 U.S. at 323.

SUPPLEMENTAL TESTIMONY OF
RICHARD J. WILSON

At the hearing of November 13, 1981, Senator Heflin asked two questions regarding the adoption of S. 653. This brief additional statement addresses those two questions.

1. What impact would legislation modifying or abolishing the exclusionary rule have on the adoption of S. 653?

Two bills are presently pending in the Senate which would modify or abolish the exclusionary rule. These are S. 101 and S. 751. The unequivocal answer to the question posed above is that adoption of either of these bills would have no effect on either the legislation proposed in S. 653 or on present habeas corpus actions by state prisoners. The reason for this lies in the decision of the U.S. Supreme Court in Stone v. Powell, 428 U.S. 465 (1976).

In summary, Stone v. Powell holds that federal habeas corpus courts cannot ordinarily order state courts to apply the exclusionary rule as a remedy for violations of the Fourth Amendment. The practical effect of this ruling is to prevent federal courts from adjudicating most Fourth Amendment claims raised in habeas corpus petitions. The only cases susceptible to re-litigation in the federal courts are those in which the petitioner has not been afforded an opportunity for "full and fair litigation" of the claim in the state court system. Abolition of the exclusionary rule in federal courts would have no binding effect on state courts, which would be free to adopt more stringent constitutional standards. Thus, even the problem of re-litigation of a "full and fair hearing" claim by the federal courts would not be eliminated in federal habeas corpus actions by state prisoners.

2. What effect would the sentencing provisions of proposed amendments to the federal criminal code have on S. 653 and state prisoner habeas corpus actions?

Again, adoption of revisions in the sentencing practices of federal courts, however radical, would have virtually no effect on habeas corpus actions in federal courts by state prisoners. Many changes in sentencing practices, almost universally opposed by NLADA, are advocated in S. 1630, a comprehensive bill to amend the federal criminal code. Whatever NLADA's position may be regarding that legislation, its adoption would have virtually no impact on state prisoners seeking federal habeas corpus relief. Moreover, even if sentencing innovations adopted at the federal level are adopted at the state level, claims with regard to sentences alone are not subject to re-litigation in federal habeas corpus, since such issues do not raise claims of constitutional dimension.

PREPARED STATEMENT OF ROBERT L. HARRIS

Mr. Chairman and Members of the Committee:

The National Bar Association (NBA) welcomes this opportunity to present its views on Senate Bill 653. We believe that the enactment of this legislation would pose serious constitutional problems and would have negative consequences for the cause of justice. For the reasons stated hereinafter we are opposed to this legislation and urge the committee to reject its passage.

The National Bar Association was founded in 1925 and now consists of a network of over 8500 lawyers, jurists, scholars, and students, with affiliate chapters in 40 states and the Virgin Islands.

The purpose of the National Bar Association is to advance the science of jurisprudence, uphold the honor of the legal profession, promote social intercourse among the members of the bar, and protect the civil and political rights of all citizens of the several states of the United States.

The proposed amendment to section 636(b)(1)(B) of Title 28, United States Code, is frightening. It proposes to delete from the code the right of prisoners to petition federal courts challenging their conditions of confinement. Removing a prisoner's right to challenge his conditions of confinement not only raises grave constitutional problems but is a step backwards into the dark ages. Under the proposed amendment, regardless of how repugnant or inhuman the condition of confinement may be, a prisoner would no longer have the statutory right to challenge such conditions.

No legitimate purpose can be served by removing from the code a prisoner's right to challenge his conditions of confinement. It is obvious that removing a prisoner's right to challenge his conditions of confinement is aimed at retribution rather than humanitarian concerns for the conditions under which the prisoners must live. It is a sad commentary to the mental state of a society which would deny adequate conditions of confinement to those that society seeks to punish. Even though it is apparent that the intention of this proposed amendment is not to aid in the rehabilitation of a person in confinement, it is nevertheless, tragic that it would probably help to ensure that those who are confined and made to live under inhuman conditions would become even more of a danger when they are returned to society. This undoubtedly would be the end results of short-sighted and expedient proposals that are enacted to try and further extract punishment from those that are incarcerated by denying them the right to challenge their conditions of confinement.

The proposed amendment to section 2244 of Title 28, United States Code, by adding subsections (d) and (e) is wholly unwarranted. The purpose of habeas corpus proceedings is to provide an effective and meaningful instrument by which judicial inquiry may be made into the legality of a person's detention.

Adding proposed subsection (d) to the Code would severely limit a court's ability to entertain an application for a writ of habeas corpus. The new stringent requirements for a habeas corpus proceedings contained in proposed subsection (d), would preclude a person from bringing a habeas corpus proceeding "if the Federal question presented was not properly presented under State law in the State court proceedings both at trial and on direct appeal, or properly presented in a collateral proceeding and dispose of exclusively on the merits," unless the petitioner could somehow establish that the alleged violation of the federal right was prejudicial to his guilt or punishment. This requirement puts not only an unnecessary burden on the petitioner but places a burden which would make it almost impossible to succeed in a habeas corpus proceeding even though the detention is illegal.

Moreover, and perhaps even more importantly, subsection (d) adds four additional obstacles that a petitioner, seeking habeas corpus, must overcome. The additional obstacles would require that the petitioner prove that the Federal right asserted did not exist at the time of trial and that the right has been determined to be retroactive in its application; that the State court procedures precluded the petitioner from asserting the right sought to be litigated; that the prosecutorial authorities or a judicial officer suppressed evidence from being raised and disposed of; or that the material and controlling facts upon which his claim is predicated were not known to petitioner or his attorney and could not have been ascertained by the exercise of reasonable diligence. These additional requirements virtually guarantee that a petitioner could not succeed in a habeas corpus proceeding.

Furthermore, subsection (e) places a three year statute of limitation on when a habeas corpus proceeding may be instituted. Clearly, a statute of limitation upon when a person may assert a legitimate claim about his illegal detention not only raises serious constitutional problems but it cannot possibly serve the ends of justice. Such a procedure is designed solely to punish rather than aid in according due process to those accused of violating the law.

The National Bar Association believes that the enactment of this subsection will have far-reaching consequences for the administration of justice throughout the State courts of this nation. Rather than enhancing the justice system, it will undoubtedly encourage the development of a justice system which seeks to convict and detain people accused of crime by "any means necessary." This, the NBA submits, is destructive to the goals of justice for all.

The proposed amendment to section 2254(d) of Title 28, United States Code, is totally unwarranted. Said amendment would, in effect, destroy the constitutionally protected due process rights of those who have been wrongfully incarcerated in state prisons. History has shown, and continues to show, that there are instances where defendants have been wrongly incarcerated by overzealous state officials who have ignored due process in pursuit of what such officials believe to be necessary for combating crime.

Section 2254(d) would prevent a federal court from examining whether or not a defendant was "otherwise denied due process of law in the State court proceeding." Moreover, it would preclude a Federal court from examining a State court's records to determine whether the State court's proceedings and conclusions derived therefrom were, as a whole, fairly supported by the record. This, to be sure, represents a marked departure from the constitutional requirement of guaranteeing fairness to those who have been the victims of unfair State court proceedings.

It is, indeed, a tragic mistake for this nation to change its statutes so as not only to endanger the prospects for defendants receiving a fair determination of their guilt in the various State courts but to encourage state officials to obtain convictions by means which are unfair. Removing from habeas corpus proceedings an applicant's right to challenge a State court proceedings on due process grounds as well as on the grounds that the record as a whole does not support the factual determination made in the State court proceedings is an open invitation to unfairness and criminality on the part of those who purport to uphold the law.

In the world of firefighting, the old adage that fire sometimes must be fought with fire may have some merit, but that approach cannot be employed in a democratic society where the rights of those accused of violating the law must be zealously protected in order to guarantee freedom for all. The proposed amendment to section 2254(d) is designed to "fight crime with crime" by tolerating criminality on the part of state officials. This approach, the National Bar submits, is a most dangerous approach that cannot possibly aid the reduction of crime but rather will aid only in the commission of more crime especially on the part of those who purports to uphold the law.

Senator HEFLIN. The subcommittee stands adjourned.

[Whereupon, at 12:35 p.m., the subcommittee recessed, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL SUBMISSION FOR THE RECORD

Statement in Opposition to S. 653, submitted by Larry W. Yackle, Professor of Law, University of Alabama School of Law, P.O. Box 1435, University, Alabama 35486. Phone: (205) 348-5930.

I would like, first, to thank the Chair and the Committee for this opportunity to address the serious problems presented by the bill under consideration. I have been concerned with the problems surrounding the federal habeas corpus jurisdiction for nearly a decade. My first paper on the subject appeared in 1973. More recently, I have published a book--L. Yackle, Postconviction Remedies (1981). I believe that I can lay claim to some measure of expertise in the field, and I hope that my comments will contribute to the Committee's deliberations. Needless to say, I speak for myself and not the University of Alabama or its Law School.

I. Preliminary Comments

S. 653 would amend key provisions of the present habeas corpus statutes in a variety of ways, each to be examined below. My position on the bill can be stated briefly. I oppose it. I oppose it, first, because it is unnecessary and, second, because it threatens the fundamental principle upon which the American system of collateral review has rested for thirty years--the proposition that persons convicted of crime in state court are entitled to at least one opportunity to litigate their federal claims in a federal forum.

While I would not wish to speak for those who brought the matter here, I understand that S. 653 is in part designed to streamline the processing of federal habeas corpus petitions. Proponents hope to conserve the time and effort of the lower federal courts. Arguments along these lines proceed from a faulty premise--that the processing of habeas petitions is now somehow inefficient. The fact is that these cases cause no more difficulty for the federal courts than any other. Indeed, given the number of habeas actions disposed of summarily, and thus without the expenditure of substantial resources, it seems that in this field the federal courts are doing comparatively well. Recent reports from the Administrative Office indicate that the volume of habeas litigation is declining. Indeed, it is plummeting. See 1981 Annual Report of the Director (noting a 14% decline over the previous decade).

Only five years ago, the Supreme Court promulgated and the Congress approved a special set of procedural rules for habeas matters. Much time and effort were expended on the fashioning of those rules, and I have seen no evidence that they are not having the very effect for which they were intended. I will point out below that the proposals buried in S. 653 are little more than warmed-over ideas the Congress has rejected in the past. To that extent, this bill arrives late in the day. At the same time, given that the federal courts have only recently begun to use the new habeas rules and their effect may not yet be fully known, the bill also comes too soon. I would counsel patience, so that we can know the extent of success the new rules will bring us before we shift course and embrace S. 653.

Even if inefficiency were a current problem, and I do not agree that it is, this bill would do nothing to mitigate difficulties and much to exacerbate them. The proposal to eliminate the authority of federal magistrates to conduct habeas hearings is an obvious illustration. In addition, of course, the introduction of new language in the statutory scheme will spawn a round of litigation. As it is, we have a fair body of precedent regarding the relevant statutes and a good set of procedural rules to guide the courts. This is scarcely the time to meddle. I would say of the present habeas scheme what in Alabama we say about anything that is currently working well: "If it ain't broke, don't fix it."

Coming to substance, the Committee should understand S. 653 for what it is--a challenge to the bedrock of American postconviction review. At least since Brown v. Allen, 344 U.S. 443 (1953), the federal writ of habeas corpus has served as an effective vehicle for guaranteeing a federal forum for federal claims arising in state criminal prosecutions. It goes without saying that the Supreme Court lacks the resources necessary to treat all or even many cases on direct review, and, that being the case, the federal habeas courts have long served as functional surrogates. The principle that the federal habeas forum must be open is well settled and has been reaffirmed only recently in Justice Rehnquist's important opinion for the Court in Wainwright v. Sykes, 433 U.S. 72, 87 (1977).

Federal habeas corpus has not, to be sure, been without its critics. Over the years a goodly number of bills designed to undercut the postconviction writ have been introduced in the Congress. The Nixon Administration bill in 1973 is, perhaps, the best example. S. 567, 93rd Cong., 1st Sess. Some of the bills have come burdened with serious constitutional questions. Cf. Sanders v. United States, 373 U.S. 1, 11-12 (1963). Others have simply been found unwise. At all events, in virtually every case proposals to curtail the availability of federal habeas have been turned back. The few amendments that have been adopted have, in large measure, tracked already-existing Supreme Court decisions. See generally Postconviction Remedies § 19. S. 653 should suffer the same fate. This bill, like similar bills in the past, assumes without adequate evidence that the very existence of the habeas jurisdiction threatens important state prerogatives. That simply is not true. As the discussion which follows demonstrates, present law takes due account of legitimate state interests, striking the proper balance between state concerns on the one hand and federal rights on the other.

II. Section-by-Section Analysis

1. The Proposal to Eliminate the Authority of Federal Magistrates to Conduct Evidentiary Hearings.

Section 1 of the bill would amend the Federal Magistrates Act to eliminate the present authority of United States magistrates to conduct evidentiary hearings in habeas corpus proceedings in which state conviction judgments are attacked. Given the sizeable caseloads of most district courts, it seems odd that anyone would propose adding to the work of Article III judges. Indeed, it was only in 1976 that the Congress extended authority to conduct habeas hearings to magistrates, in an obvious attempt to relieve district judges of routine, fact-finding responsibility. 28 U.S.C. § 636 (b)(1).

Under present law, district judges need not, but may, use their magistrates to facilitate the fair and just treatment of habeas petitions. I am not sure what the effect of a return to the situation which prevailed prior to 1976 would be. If district judges would conduct any evidentiary hearings that would otherwise have been handled by magistrates, and it is Congress' judgment that this work is more pressing than other things that district judges might be doing, then I have no real objection. I suspect, however, that the press of other business must take its toll and that, without the assistance of magistrates, district judges would order fewer hearings in habeas and would tend, in any hearings actually conducted, to expend less effort ascertaining the critical facts.

If that is the case, then I do object--and with reason. If my suspicions are sound, then the proposal to remove magistrates' authority to conduct habeas hearings should be seen as, in fact, an indirect attack upon the habeas jurisdiction. Put bluntly, if habeas applicants cannot be frustrated any other way, then the supporters of S. 653 seem prepared to complicate, rather than streamline, the processing of their claims and thus to prevent fair and efficient consideration.

The data regarding the use of magistrates in habeas corpus are incomplete. The best study of which I am aware, prepared for the Department of Justice by Professor Paul H. Robinson, focuses attention upon magistrates' duties short of conducting habeas hearings. Professor Robinson reports, for example, that when cases are referred to magistrates for screening and recommendations, district judges tend to accept the advice they are given and dispose of petitions accordingly. Magistrates often identify procedural deficiencies that district judges overlook. Indeed, Professor Robinson reports that habeas applicants whose claims are examined only by district judges, without the aid of magistrates, tend to fare better--suggesting that district judges overlook bases for denying relief and, reaching the merits, hold for the prisoner more often than would magistrates. See P. Robinson, An Empirical Study of Federal Habeas Corpus Review of State Court Judgments 23-30 (1979).

S. 653 does not speak to the present, widespread use of magistrates to screen petitions, but rather concerns itself with the conduct of evidentiary hearings. Again, I can only speculate on the likely consequences of the enactment of the bill. I worry that if magistrates are deprived of authority for this important work, the very authority the Congress extended to them only five years ago, the result will be that the work will not be done. No legitimate public policy is served by holding out the theoretical promise of collateral review in federal habeas corpus, but at the same time withdrawing the federal courts' practical ability to process applications for relief.

2. The Proposal to Defer to State Procedural Grounds

Section 2 of the bill reaches directly to the present statutes governing federal habeas corpus. It would transform Section 2244, which now speaks only to the finality of federal habeas judgments, into a general barrier to the treatment of federal claims that were not considered in state court because of procedural default. While forfeitures for procedural default in state court are contemplated by present law, see Wainwright v. Sykes, supra, the regime which would be ushered in by S. 653 is vastly more rigid.

The bill would simply bar habeas corpus examination of federal claims that were not "properly presented under State law in the State court proceedings both at trial and on direct appeal, or properly presented in a collateral proceeding and disposed of exclusively on the merits. . . ." It is, of course, already true that petitioners attacking state judgments must exhaust available and effective state remedies before seeking federal habeas relief. And, if state remedies are not available because of petitioners' procedural default, it is already the law that the federal habeas courts will often stay their hand. Importantly, however, the question whether a procedural default will foreclose federal review in habeas is now, and always has been, a question of federal law to be determined ultimately by a federal court. This is to say, under present decisional law established by landmark Supreme Court decisions, prisoners who have forfeited state remedies for failure to comply with state procedural rules are not, for that reason alone, barred from raising underlying federal claims in habeas. The federal courts first ascertain whether, in truth, state remedies have been forfeited under state law, and then ask the further, and qualitatively different, question whether as a matter of federal law the procedural default should also cut off federal review. This second question turns on a frank examination of the state interests served by the forfeiture sanction in light of the individual and federal interests in the just treatment of federal claims.

Under present law, if the federal courts find the state interests served by the forfeiture inadequate, or if prisoners demonstrate "cause" for and "prejudice" flowing from their procedural defaults, the merits can be reached. This is the arrangement established in Wainwright v. Sykes, supra. That decision is viewed widely as, if anything, too deferential to state procedure. See Postconviction Remedies § 83-87. S. 653 would introduce even more rigidity, permitting state law alone to control the forfeiture decision. It would, for example, return our law to the barbarity of Daniels v. Allen, 344 U.S. 443 (1953), a capital case in which the Supreme Court gave effect to a state forfeiture sanction where the prisoner's only default had been to file his appellate papers one day late.

In an over-zealous attempt to accord deference to the states, S. 653 would render up the very availability of the federal forum to the vagaries of state procedural law. The Committee should understand that it is compliance with state law only that is critical under the regime this bill would establish. Federal claims would be forfeited in both state and federal court, because of prisoners' failure to comply with state law as determined by state courts. Nor is any distinction drawn between inadvertent failure to comply and a deliberate tactical maneuver; nor between defaults tied to counsel's incompetence and those for which prisoners themselves share responsibility. The mere *fact* of procedural default, without more, is sufficient to foreclose habeas treatment of what may be meritorious federal claims. Indeed, read literally, S. 653 appears to bar federal habeas review even if the state courts themselves do not impose a forfeiture sanction for procedural default. Such a result would be unconscionable, a needless and pointless frustration of justice.

3. The Proposal to Except Only "Guilt-Related" Claims

The exceptions provided in S. 653 are far too narrow to mitigate the impact of the basic forfeiture provision. Petitioners who failed to present their federal claims "properly" in state court may nevertheless obtain federal habeas review if the violations of federal right they allege were "prejudicial . .

. as to . . . guilt or punishment" and one of several further circumstances was presented.

The attempt essentially to limit habeas corpus to the treatment of so-called "guilt-related" federal claims has a long history. The most notorious previous attempt to build such a limitation into the law was made by the Nixon bill in 1973. Similar arguments were raised in 1976, when the habeas rules were under discussion in the House. On both those occasions, the Congress refused to embrace the extraordinary proposition that some federal claims, those related to "guilt," should be treated more hospitably than others. H. R. Rep. No. 1471, 94th Cong., 2nd Sess. That is hardly surprising. For the proposition is fundamentally flawed.

To begin, the term "guilt" is ambiguous. Does S. 653 refer to what is commonly called "factual" guilt, that is, the question whether a prisoner in fact committed the acts which, with other necessary proof, constitute the offense? Or does it refer to "legal" guilt, that is, the question whether the prisoner could be proved to have committed the offense by constitutional means? I put it to the Committee that if the bill refers to "legal" guilt, then by hypothesis every federal claim is related. If the bill refers to "factual" guilt, then it challenges the fundamental American precept that official consequences flow only upon lawful conviction.

Even accepting the supposed distinction between "factual" and "legal" guilt, I put it to the Committee that the proponents of S. 653 will find it difficult to separate the constitutional claims commonly raised in habeas from the search for "guilt in fact." While many procedural safeguards guaranteed to criminal defendants serve to protect other values as well, almost all help to ensure the accurate determination of facts in issue. Only the fourth amendment exclusionary rule can, perhaps, be viewed as wholly unrelated to correct fact-finding. And in that field the Supreme Court's decision in Stone v. Powell, 428 U.S. 465 (1976), has already sufficiently limited the availability of federal habeas review. In other cases, the Court has steadfastly refused to erect a hierarchy of federal rights and to extend or withdraw federal habeas protection from claims according to their position on such a hierarchy. See, e.g., Rose v. Mitchell, 443 U.S. 545 (1979).

Finally in this vein, the Committee should understand that the introduction of any "factual" guilt test in habeas corpus would break with tradition reaching back to English common law. The Great Writ has never been concerned for the guilt or innocence of the applicant, but for the validity of detention. See Postconviction Remedies § 101. It is late in the day to ignore fundamental federal rights long ago fought for and won, simply because they seem, in the present political climate, comparatively less important. The proposition that such rights do not matter, because prisoners are "probably guilty anyway" is unworthy of the Congress and its long-standing commitment to the enforcement of the Bill of Rights.

4. The Proposal to Attempt a Statutory Definition of "Cause"

Under the amendments offered in S. 653, not even prisoners who establish that their claims are "prejudicial" with respect to "guilt or punishment" are yet free to litigate in the federal forum. In order to be free of the harsh forfeiture sanction for procedural default established by the first sentence of Section 2, they must demonstrate one of four circumstances. If the claim had not yet been established when it might have been raised, if state procedures precluded its assertion, if state authorities suppressed evidence with regard to it, or if material facts were not known at the time--then "guilt-related" claims may be examined in habeas. It appears that these exceptions constitute an attempt legislatively to define "cause" for procedural default within the meaning of Wainwright v. Sykes, supra. See Attorney General's Task Force on Violent Crime, Final Report 60 (1981).

The attempt must be found wanting. Certainly if any of these circumstances are shown, then "cause" should be found for procedural default in state court, and the federal habeas forum should be open--even if the state courts, for their own inscrutable reasons, refused to reach the merits. Yet these exceptions can scarcely be the end of the matter. There are other circumstances which justify a finding of "cause."

The Committee must understand the evil with which the Court was concerned in Sykes, and against which the "cause" standard was designed to protect. Only then can the full meaning of "cause" be determined. Moreover, when the Court's intentions are clearly understood, I think it will be plain that "cause" should, and must, be left to judicial implementation on a case-by-case basis. The misguided attempt to codify so flexible a notion is doomed to failure.

The problem addressed in Sykes was "sandbagging," defined by the Court as "the practice of withholding federal claims in state court, thus committing procedural default, in the hope of obtaining a favorable verdict--but with the intention of raising those same federal claims later if the 'gamble' does not 'pay off.'" Yackle, Book Review, 17 Crim. L. Bull. 479, 498-499 (1981). The tactic is "intentionally to build constitutional error into a criminal prosecution, to hope that the client will be acquitted anyway, but then to be prepared to raise the federal claim later in habeas corpus if the client should instead be convicted." Id. at 499.

There is a rich literature on the relationship between defense counsel's tactical maneuvers in state court and the requirements of state procedural law; and, in turn, between forfeitures of state remedies brought about by such tactics and the continuing availability of habeas corpus in federal court. See generally Postconviction Remedies, ch. 6 (collecting authorities). Suffice it to say here that the Court in Sykes had those questions very much in mind and established the "cause" test in order to screen from the federal forum cases in which counsel's strategic maneuvering in state court had resulted in procedural default and consequent forfeiture of state process. The Court was not concerned with default which is the result of counsel's ignorance, negligence, or sloth. There was no attempt in Sykes to cause prisoners to forfeit federal habeas review simply because of counsel's incompetence, whether or not that incompetence rises to the level of ineffective assistance of counsel within the meaning of the sixth amendment. "[T]he evil [of sandbagging] does not lie in defense counsel error, in negligence or ignorance, but in deliberate trial tactics the Court will permit the state courts to punish with a forfeiture sanction--in order to protect their opportunity to adjudicate federal claims before the federal habeas jurisdiction is invoked. Certainly if the root idea is to create incentives to comply with state rules governing the orderly processing of criminal cases, it makes sense to confine the new [cause] analysis to cases in which counsel was aware of the need to conform, or at least the consequences of procedural default." Book Review, supra at 499.

The only fair conclusion to be reached is that the "cause" test in Sykes can be satisfied by a showing that defense counsel's default in state court was the "product of something other than a deliberate, tactical maneuver . . . ." Id. Procedural default derived from counsel's ignorance, negligence, or worse will not, then, foreclose federal review. This is the clear import of Sykes as that decision has been understood to date. Postconviction Remedies § 86 (1982 Supplement). The definition of "cause" proposed in S. 653 is much narrower and is plainly calculated to hold state prisoners responsible for the incompetence of defense counsel--over whom they have no control. The Supreme Court has proposed no such harsh treatment of federal claimants. Nor should the Congress through an unfortunate misunderstanding of the Sykes decision.

In the wake of Sykes, the lower federal courts are even now filling out a fair and equitable framework for examining the question of "cause." That framework blends structure with necessary flexibility. It promises to work and to work well, striking the proper balance between state and federal interests. This bill's misguided attempt to hammer the "cause" notion into statutory form should be identified for what it is and rejected.

5. The Proposal to Establish a Three-Year Statute of Limitations

The proposed amendment of Section 2244 would establish a rigid, three-year statute of limitations for habeas petitions attacking state criminal judgments. This is, perhaps, the plainest evidence that the proponents of S. 653 do not understand and appreciate the present system of habeas corpus review. Everyone who has studied these problems recognizes that stale claims create difficulties for all parties to litigation. Reasonable and just devices for encouraging the earliest practicable pursuit of federal relief are, accordingly, entirely proper. The federal courts have always taken into account any unreasonable delay in the filing of habeas petitions, and a great many petitioners have been denied relief precisely because their inexcusable delay prejudiced the ability of the respondent to defend. See Postconviction Remedies § 114.

Under existing habeas corpus rules, petitions may be dismissed "if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of due diligence before the circumstances prejudicial to the state occurred." § 2254 Rule 9(a). The federal courts have developed an effective framework for evaluating claims of undue delay and prejudice to the state--providing fair and just protection against prisoners who deliberately withhold claims.

Yet no one has successfully defended the proposition that a rigid statute of limitations would be appropriate or is needed in this field. It is in the nature of collateral claims that they come to the attention of prisoners or counsel well after the judgments subject to attack. The Supreme Court has recognized as much on many occasions. Postconviction Remedies § 114. Few principles are better-settled than that federal habeas review is available "without limit of time." United States v. Smith, 331 U.S. 469, 475 (1947).

The Committee should also understand that considerable time is required in all cases in order to comply with the requirement that state remedies be exhausted before federal relief is sought. Prisoners have no control over the time the state courts take to consider their claims. Yet the proposed three-year statute of limitations takes no account whatever of their plight. Testimony in the House in 1976 made it plain that the exhaustion of state remedies often requires more than five years. See Clinton, Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts, 63 Iowa L. Rev. 15, 26-29 (1977). See Coleman v. Balkcom, ____ U.S.____,____n.5 (1981)(Stevens, J., concurring)(commenting on the delay occasioned by the exhaustion doctrine).

Only five years ago, the Congress rejected a proposal to establish a rule recognizing a "presumption" of prejudice to the state if a habeas application is filed more than five years after the judgment under attack. H.R. Rep. No. 1471, supra. See generally Postconviction Remedies § 114. Ignoring that recent history, the proponents of S. 653 now offer a rigid, three-year statute of limitations--with no flexibility aside from an exception for newly-announced claims and with no cognizance of the time required for exhausting state remedies. The only possible result of such an enactment would be the frustration of claims that are delayed through no fault of the applicant--without so much as a showing of prejudice to the state concerned.

The Committee should understand that this proposal is made in the teeth of Professor Robinson's study, which shows that habeas applicants do not generally delay filing petitions. Most filings, indeed, are made within one and one-half years of conviction. P. Robinson, supra at 9. Prisoners too, see the need for expedition and respond accordingly. There is, then, no empirical evidence that so harsh a device as a statute of limitations is needed in this field. If enacted, it would come into play in only a small number of cases, and then it would punish petitioners needlessly. Present law, including Rule 9(a), provides ample protection against stale claims. There is no need for, and much reason to resist, a rigid rule that cuts off federal claims without asking why they were not presented sooner.

6. The Proposal to Restrict the Federal Courts' Authority to Determine Facts Critical to Federal Claims

Section 3 of the bill would amend Section 2254(d) of the present habeas statutes in several material respects. There has been loose talk in some decisions, suggesting that Section 2254(d), as it currently reads, is a "codification" of Townsend v. Sain, 372 U.S. 293 (1963). That is not the case. In Townsend, the Supreme Court set forth the circumstances in which the federal courts may, and in some instances must, make their own factual determinations. While Section 2254(d), enacted in 1966, establishes standards similar to those used in Townsend, the question in this context is not whether the federal courts will hold a hearing, but what effect previous findings by the state courts will be given in a federal hearing. Developments in the Law--Habeas Corpus, 83 Harv. L. Rev. 1038, 1122 n.46 (1970). Accord LaVallee v. Delle Rose, 410 U.S. 690, 701 n.2 (1973)(Marshall, J., dissenting). Present law assumes that a federal hearing will be held and addresses the quite different question of the deference to be accorded state findings.

The amendments proposed in S. 653 would rework all that. The language changes are inartful at best, failing even to improve upon the admittedly convoluted wording of the current section, but in the end S. 653 means to provide that the federal courts will not hold evidentiary hearings in the first instance unless one of several, numbered circumstances obtained in state court. The bill would, in other words, do what Section 2254(d) does not do now--restrict the very authority of the federal habeas courts to determine facts vital to federal claims.

This would be a dramatic step. The Supreme Court has long recognized that the adjudication of federal substantive claims may often demand that the underlying facts be ascertained with the greatest sensitivity. The determination of primary facts cannot be divorced from the adjudication of the legal claims to which those facts are relevant. See Brown v. Allen, supra; Townsend v. Sain, supra. In most situations, of course, state court findings are reliable and can be adopted in the federal forum. I daresay that is routine. Yet the federal courts have long found it essential to have at least the discretion to make an independent examination in appropriate circumstances.

Present law leans decidedly in favor of deference to state findings. I have described the operation of Section 2254(d) as follows:

> [T]he respondent must first present "due proof" of the state court factual determination by introducing "a written finding, written opinion, or other reliable and adequate written indicia . . . ." Then, unless the respondent concedes the point or the court finds on its own motion that the state court hearing was inadequate, the petitioner must show that the hearing failed one of the listed standards and, accordingly, that the state court findings may not be presumed correct. In practice, the courts expect the petitioner to allege in the application for relief specific circumstances that the prisoner contends make the state court determinations of fact unreliable. The standard of proof at this point is apparently a preponderance of the evidence. That is, if the petitioner can show by a preponderance of the evidence that the state court hearing was inadequate under one or more of the standards in section 2254(d), the case is taken out of the statute altogether. In that event, the state court determination is not presumed correct, and the federal hearing must be a fresh one. Still, the petitioner has the burden of proving by a preponderance of the evidence that relief is warranted, but the prisoner's case for relief is no longer burdened by a presumption in favor of state court findings. Once the petitioner establishes a prima facie case for habeas relief, the respondent has the burden of coming forward with evidence in rebuttal. If the respondent is unable to rebut the petitioner's case or establish that the error was harmless beyond a reasonable doubt, appropriate relief must be awarded.
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> If, on the other hand, the petitioner cannot establish by a preponderance of the evidence that the state court proceeding failed one of the statutory standards, section 2254(d) provides that the state factual determination is presumed to be correct--unless the petitioner shows by "convincing" evidence that the state determination was erroneous. The matter shifts, then, from a structural appraisal of the state fact-finding procedure to a substantive review of the results reached, as to evidentiary facts, in state court. The "convincing" evidence standard for that review is intentionally stringent. In point of fact, a petitioner faced with it will often find the barrier to federal relief insurmountable. Postconviction Remedies § 134 (footnotes omitted).

The Supreme Court decisions interpreting Section 2254(d) have been at pains to require extraordinary attention to state findings. E.g., LaVallee v. Delle Rose, 410 U.S. 690 (1973).

Very recently, the Court went so far as to hold that when the federal courts do not grant to state findings the presumption of correctness established in Section 2254(d), they must state precisely why it is, within the provisions of the statute, that the findings fail to satisfy. Sumner v. Mata, ____U.S.____(1981).

This is current law. One wonders what more could be necessary to impress upon the federal courts that state findings are due respect. Yet S. 653 does propose to do more. Where present law establishes a strong presumption in favor of state findings, S. 653 would substitute an absolute prohibition on the redetermination of facts. Where present law permits federal findings when material facts "were not adequately developed" in state court, S. 653 would substitute the condition that they "could not be developed" there. And where present law permits federal findings when the petitioner did not receive a "full, fair, and adequate" hearing in state court, or when due process was otherwise denied, S. 653 proposes no substitute at all. Importantly, where present law allows the federal courts to make their own findings when the findings in state court are not "fairly supported by the record," S. 653 demands that there be "no evidence" at all to support the state findings.

Taken together, these proposed amendments represent dangerous overkill in a situation in which present law already leads to the adoption of state findings in almost every case. The result, once again, is nothing gained in most instances, but a clear loss in flexibility in those cases in which federal judgment is only reasonable. Like the three-year statute of limitations proposed in S. 653, these amendments, if enacted, would come into play only in rare cases and then only to frustrate common sense--cases in which there is genuine reason to depart from the routine embrasure of state findings and to examine critical facts in the federal forum.

III. Conclusion

It is not uncommon that political positions harden in the ideological make-up of those who embrace them. They may, then, take on a life of their own. Years ago, the jurisdiction of the lower federal courts to examine state criminal judgments in postconviction habeas corpus was very much a "hot" political question. Articles and reports were written, arguments were made, and positions, most importantly, were taken. After the debate, in the Congress and elsewhere, the result was plain. Habeas corpus review of state judgments was recognized as a desirable and effective part of the structure of American criminal justice.

Some state interests were, to be sure, subordinated to the greater national interest in the enforcement of federal rights. Yet, in the main, ways were found to acknowledge and respect the most important state concerns so as to avoid unnecessary friction. Amendments to the habeas corpus statutes in 1948 and in 1966, together with a string of Supreme Court decisions, have ameliorated considerably any remaining difficulties. Now, the new habeas corpus rules promise to improve efficiency. The habeas caseload which genuinely concerned some of us decades ago has tapered off and is now declining. In a healthy and welcome spirit of cooperation, the state and federal courts have established a consistent and effective framework of review, which no longer produces the hostilities generated by postconviction habeas when it was first introduced. We have worked through our problems and come to an amicable accommodation of genuine interests.

In this atmosphere, new legislation would be unnecessary and disruptive. S. 653, like so many other bills in the past, is rooted in an ideological resistance to postconviction habeas that has simply outlived the circumstances which gave rise to it. Those who advocate action on this bill must carry the burden of demonstrating that their proposals speak to real and significant problems *today*.

I hope that what I have said here helps to explain why that burden cannot be sustained. This bill is no more than a reflection of disappointment over battles lost in the 1940's. It is no more than that.

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